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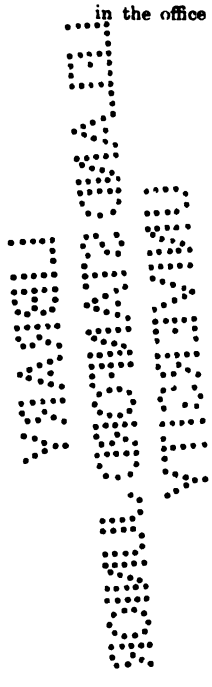

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NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. JULY 8TH, 1905.

CHAMBERS.

VICTORIA LUMBER CO. v. MAGEE.

Summary Judgment — Rule 103—Delay in Applying Delivery of Defence—No Bar to Application.

Application by plaintiffs under Rule 103 of the Judicature Ordinance to strike out the appearance and defence entered by defendant Gregory, and for leave to sign final judgment for the amount of the plaintiffs' claim.

E. L. Elwood, Moosomin, for plaintiffs.

J. T. Brown, Moosomin, for defendant Gregory.

WETMORE, J.:—The appearance was entered on 25th April, and a summons in this matter was granted on 17th June. I find by my minutes that an application for the summons was made on 22nd May. That application, however, was withdrawn, upon an intimation by me that I thought plaintiffs' claim was not properly verified, as required by the Rule. At the return of the summons the counsel for defendant Gregory urged that there had been too great delay in making this application. In fact he contended that the application should be made before the defence was delivered, and, if not, the delay should be accounted for. He relied on

McLardy v. Stateum, 59 L. J. Q. B. 154, and some Irish cases which are cited in 11 Dig. Eng. Case Law, columns 213 and 214. McLardy v. Stateum certainly supports his contention that if the application is made after the defence is delivered the delay should be accounted for. It seems to have been considered by Mr. Justice Field, whose judgment was being appealed from, that the intention of the Rule was that the application should be made before the defendant delivered his defence. While the Divisional Court was not of that opinion, they laid down the rule which I have before stated, that if the application was made after delivery of the defence the delay should be accounted for. That decision is not binding upon me; it was made in 1890, and after the Supreme Court of the North-West Territories was constituted, and, while I have great respect for decisions of English Courts and Judges, I must say that I am unable to see why any such rule should be laid down as was laid down in that case. There is nothing either in Rule 103 in question or the English Rule from which it was taken, being Rule 1 of Order 14, from which I can gather that that was the intention of the Rule. I am quite at a loss to understand why, if a party pleads a defence which is not true to an action for debt, his defence should not be struck out under the Rule at any time, provided, of course, that it is not shewn that the defendant has been in some way prejudiced by the delay. I think to hold as was held in McLardy v. Stateum would to a very great extent do away with the utility of that Rule, which to my mind serves a most excellent purpose, and I am especially impressed with that idea because the judicial districts are of such a large extent, and the Judge resides at such a distance from many of the advocates, that to lay down such a rule to my mind would be quite unsuitable to the conditions of this country, and, with all due respect, I cannot follow McLardy v. Stateum. Defendant here has filed no affidavit or given any meritorious reason why his defence should not be struck out.

I will therefore order that the appearance and defence of defendant Gregory be struck out, and that plaintiffs be at liberty to sign judgment for the full amount of their claim with costs.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. JULY 8TH, 1905.

CHAMBERS.

RE NUGENT.

Executors and Administrators — Passing Accounts of Administratrix—Carying on Business of Deceased—Liability for Loss—Liability for Goods Destroyed—Neglect to Sell—Negligence—Goods Claimed by Administratrix in her own Right—Gift — Inventory — Mistake — Delivery —Land Standing in Name of Administratrix—Jurisdiction of Probate Court—Payment to Manager of Estate.

Application by the administratrix of the estate of George E. Nugent, deceased, to pass the accounts of the estate and to dispose of exceptions to the clerk's report.

J. T. Brown, Moosomin, for the administratrix.

E. A. C. McLorg, Moosomin, for Codville & Co. and others, creditors.

E. L. Elwood, Moosomin, for the Rat Portage Lumber Co. and others, creditors.

WETMORE, J.:— . . . The administratrix is charged as follows:—

Stock in butcher shop	$339.77	
Tools and fixtures in butcher shop	103.25	
Goods bought for butcher shop	222.30	
Total		$665.32
And from that the following deductions are made:—		
Outstanding accounts	$277.52	
Paid for goods bought	159.40	
Spoiled meat	112.00	
Tools and fixtures burned	103.25	
Total		652.17

which deducted from $665.32 leaves a balance of $13.15. which is charged against the administratrix. Exception is

taken to this both by Mr. Brown and Mr. McLorg. Mr. Brown contends that the administratrix should not be charged with this loss of $13.15. Mr. McLorg's exception is that the $277.52 outstanding accounts should be charged to the administratrix, and that she also should be charged with the tools that were burned.

In Williams on Executors, vol. 2, 9th ed., p. 815, the author states as follows: "When a trader dies, obviously his trade or business descends to his executors or administrators as part of his assets. It is equally obvious that his trade or business must be either wound up or realized by his executors or administrators or be carried on by them. The carrying on of the trade or business, too, may be either merely for the purpose of realization, or it may be continued for the purpose of making profit."

The facts in this case are that this butcher business was being carried on by the deceased before and up to the time of his death. He died about 13th May, 1901, and letters of administration were not issued until 19th July, 1901. The administratrix took possession of the property as soon as he died, but this butcher shop was being carried on by one Tocher as the employee of Nugent, and she was not satisfied with the way it was being carried on, nor was Rawson, who was acting as her agent, and they were anxious to get him out of the control of the business. They were, however, advised by their solicitor that nothing could be done until letters of administration were taken out. As soon as it could be reasonably done after letters were taken out, this business was closed up.

It was urged that the letters have relation back to the death, that the administratrix should have closed the business up sooner, and, if not, she should have sold for cash, and that therefore she must assume the outstanding accounts of that business. It is true that under the law of the Territories letters of administration have relation back, but that is for the purpose of protecting the estate, it is not for the purpose of making the administrator liable on something that he could not control, as was the case here. Anyway the administratrix had the right to carry on the business. She did all she could do, and, in the circumstances of this case, I see no reason why she should be compelled to guarantee to the estate the ability of the purchasers of goods in the way of business to pay. This business was not, in the circumstances,

carried on either for the purpose of realizing or for the purpose of profit; it was merely done because the administratrix could not help herself.

Then it is contended that she must stand the loss of the tools that were burned. That was a pure accident; she brought it about in no way, but it was contended that the moment the business was closed these tools should have been sold, and, not having sold them, she must bear the loss. But the administratrix, or her agent, exercised the best judgment she could. The goods were not sold at the time the other property was sold, because they were in negotiation with one Mundell, who expressed the intention of opening a butcher business and buying these tools, and the administratrix's agent very naturally concluded that a better price could be got for the tools in this way than by putting them up at auction. These negotiations with Mundell fell through through no fault of the administratrix, and then her agent concluded that, inasmuch as there would eventually be another sale, it would be better to keep these tools until the time for that sale arrived, instead of putting them up separately—a very natural conclusion to reach—and therefore I see no reason why the administratrix should personally bear the loss occasioned by this fire.

It was contended that the loss by the spoiled meat referred to should also be borne by the administratrix, because it was lost through the negligence of Tocher. All that is necessary for me to say is that that question is not raised by the exceptions, and I do not intend to travel outside of them.

As to Mr. Brown's exception, I think under the circumstances that the administratrix should not be charged with the $13.15, and that will be struck out. I may say that the estate has the outstanding accounts, $277.52, still to realize, and, while there has been nevertheless a small loss to the estate, I cannot bring my mind to the conclusion that the administratrix was in any way to blame for it.

Item 431 is excepted to on behalf of the administratrix. She asserts that these horses belonged to her, and as to one of them she alleges that she obtained it from one Montgomery for nursing him. She asserts also that this animal, which was a mare, had increase, and that this increase belongs to her. The other horses she claims by way of gift from her husband, and these animals received from her husband were mares, and she claims the increase from these animals. There appear to be 12 or 13 of these horses, and the clerk has valued

them at $500, and then deducted the value of the horse obtained from Montgomery, which he valued at $50, and charges the administratrix with the balance, $450. The administratrix in making application for administration made an affidavit whereby she verified an inventory, and in this inventory she included these very horses as part of the estate of the deceased. She says this was done by mistake, and want of thorough comprehension of what she was doing. The evidence with respect to her right to these horses is by no means satisfactory. She has not seen the horses since 1897. She does not know whether the original animals that she obtained are alive or not, or what the increase of them is, now existing. All she says is that Nugent before he died left these horses on the ranch there with the understanding that they belonged to her. She holds a note made by Nugent in her favour for $2,000. Now, Rawson, to use a common expression, is her right hand man, and is supposed to have a knowledge of the affairs of the estate of the intestate. He seemed to think that her right to these horses arose somehow through this note. Neither Rawson nor herself nor anybody else is able to account for how the person who prepared this affidavit and inventory ever came to include these horses as belonging to the estate. I am of the opinion that it would be a most dangerous thing, except under very clear and satisfactory testimony, to permit a person recklessly to make an affidavit of this character and then practically set up that it was all done through some error or mistake. I think the evidence to establish that should be of a most clear character. Persons making affidavits should be very careful as to what they swear to, and if they swear to one thing to-day and wish to swear to something else to-morrow, entirely different, it will at any rate open a wide door to suspicion. I am of opinion that on this ground alone the clerk was justified in coming to the conclusion he reached. The only particular in which I think he was in error in holding that the property was that of the estate was in allowing the administratrix to hold as her own property the animal obtained from Montgomery. The evidence as to whether that animal is alive to-day, or what issue of it is alive, is most unsatisfactory. However, he has allowed her to hold an animal as the Montgomery one, and, as no exception is taken to that allowance, I will not interfere with it. There is another ground upon which I think that this item should be upheld, and that is that there was no such delivery of the horses claimed to be

given by the deceased to his wife as to make the gift a valid one. The gift, if any, was per verba de præsenti, and the chattels were capable of delivery. There is no evidence of any delivery that I can find. The other animals belonging to the intestate were ranging either on a ranch or at large on the prairie, and nothing whatever occurred amounting to a change of possession, and that being the case I am of opinion that it comes within what was decided in Cochrane v. Moore, 25 Q. B. D. 57.

In respect to item 434, I am of opinion that the furniture in question is not the property of Mrs. Nugent, but belongs to the estate. It was conceded at the argument that this furniture was in the possession of the widow of the deceased. I find that this furniture, at any rate to the extent of $500, was necessary for the maintenance and support of Mrs. Nugent, the widow, and to the extent of $500 I should judge would be exempt from seizure under execution against the administratrix at the suit of a creditor of the estate. I am of opinion, however, that it is not necessary to determine that question at present, because this furniture has not been disposed of, and is still in the hands of the administratrix. While the creditors may have possibly no claim on it unless it exceeds $500 in value, the next-of-kin and those entitled to distribution have a claim on it, and the property should therefore be placed among the outstandings. If the value of the furniture exceeds $500, I am of the opinion that the administratrix should hold the excess over that amount for the benfit of creditors, if such excess is necessary for the purpose of paying their claims to be applied for that purpose. It was understood at the argument that Mr. Brown was to furnish an affidavit as to the value of this furniture. This affidavit has not been furnished, and I do not consider it necessary to postpone my judgment upon this item until he does file it, because the administratrix will have to account for it on some future accounting, and it is not necessary at present to put a value upon it. . . .

It was contended on behalf of the creditors that the clerk should have charged the administratrix with the house and lots occupied by her at Wapella. The administratrix is the registered owner of this property. The evidence points in the direction that she received it from her husband as a gift, and the contention is that this is void as against creditors under the Statute of Elizabeth. I am of opinion that sitting on the Probate side of the Court I have no jurisdiction to

declare this assignment to her fraudulent. That is really what I am asked to do. I do not know that I am asked to set aside the deed, or that there was any conveyance from Nugent to his wife, the administratrix; if there was, the setting aside of the deed would simply put the property back in the hands of the person who conveyed it to Mrs. Nugent. What I presume I am asked to do in effect is to hold that Mrs. Nugent, however she may have got the property, whether from her husband or some other person, is trustee thereof for the benefit of the estate. That is no part of the province of the Probate Court. While I have under the Ordinance to administer justice on the principles of equity, I cannot bring my mind to the conclusion that this was intended to give the Probate Court a jurisdiction which it never had, either in England or in this country, that I am aware of. I am therefore unable to make any adjudication with respect to this property.

The only matter remaining for consideration arising out of the exceptions filed is an allowance to one H. J. Rawson for his services in connection with the estate. This estate was a very complicated one. The deceased seems to have had a great many irons in the fire. He had property, both real and personal, which he owned in his individual right, and he had a number of outstanding debts due him in the same right. He carried on business as a general merchant at Hazelcliffe and a business as a butcher in Wapella. He was also a prominent member of the firm of Nugent & Co., which carried on an extensive business, and was, as I understand it, composed of himself and a Mrs. McGrath. He was also largely concerned in another partnership named "Nugent & Martin," which carried on another business. These two partnerships on Nugent's death suspended business, and made assignments to Rawson as trustee for the benefit of creditors. About the time of the appointment of Rawson as trustee it was aranged that he was to receive $75 a month for his services in attending to and managing the three estates; that is, the Nugent estate, which was to be administered, the estate of Nugent & Co., and the estate of Nugent & Martin, and Rawson did accordingly manage these estates. He has apportioned the amount payable among the 3 estates as follows: Two-fifths of the amount to the Nugent estate, two-fifths to Nugent & Co., and one-fifth to Nugent & Martin. In so far as the division is concerned, it was not questioned that this

would be a fair division. But it is contended that Rawson is not entitled to any allowance out of the Nugent estate, that all that can be done is to make an allowance to the administratrix as such, and that she will have to pay him out of that, if he is paid by anybody. It was also urged that if Rawson is entitled to an allowance, the amount he claims is too high, and that he was an unnecessarily long time winding up the estate, and also that instead of being allowed a stated salary he should be paid a commission. As to the question of Rawson being entitled to be paid out of the estate, I can find no authority upon the subject, nor has any been pointed out to me, but I have come to the conclusion that he, in the circumstances of this case at any rate, is reasonably entitled to be paid out of the estate. The administratrix, who was the wife of the deceased Nugent, was clearly the person first entitled to a grant of letters, and they would and did issue to her as a matter of course upon her application. Now, I think it is fair to assume that being a women her business capacity would not be sufficient to deal with an estate which was so intricate and mixed up with the partnerships specified as this one is, and I think it was quite right and proper for her, in the circumstances, to employ a competent accountant to gather in and wind up the estates, because the administratrix was interested in all the estates. Rawson appears to have been a competent man, and I am of opinion that the $75 a month he claims was a reasonable amount, and I am of opinion that the Nugent estate, the accounts of which I am now dealing with, should bear its proportion of the price agreed to be paid to him, that is, two-fifths of $75 a month, which would be $30 a month. I have come to the conclusion, in all the circumstances, that Rawson was not an unreasonable time doing what he did do. The estate is not yet wound up, and there is a good deal of it to be got in, and I should judge there will have to be another passing of accounts; and if the price which I have held to be reasonable is a proper allowance to make to him, I see no reason why I should be bound to come at it by commission. I will therefore allow the administratrix credit for Rawson's services at $30 a month from the time his services commenced until they ended; and I will leave it to the clerk to adjust that amount under the evidence, and add it to the disbursement account of the administratrix.

YUKON TERRITORY.

CRAIG, J. JULY 12TH, 1905.

TRIAL.

McDONALD v. BUCHOLTZ.

Principal and Surety — Guaranty — Release of Surety — Promissory Note Collateral to Guaranty — Extension of Time by Days of Grace.

Action against defendants Gandolfo and Bucholt upon a guaranty and against the other defendants upon their original liability as debtors for goods sold. The guaranty was in the following form: "The McDonald Trading Company, Dawson; Gentlemen: I hereby guarantee the payment to you of the account of Charles Dahl and Manton Lofstrom for hay and oats to the amount of $1,260 and interest on the same from the 15th day of October, 1903, to date of payment, at the rate of 15 per cent. per annum. Full payment to be made prior to August 1st, 1904; 14 tons at $90 per ton." (Signed by Bucholtz and Gandolfo.)

A. Noel, for plaintiff.

K. Macrae, for defendant Gandolfo.

CRAIG, J.:—It appears from the evidence that the debtors were engaged in mining operations on a claim in which defendant Gandolfo had an interest, and desiring to obtain credit from plaintiff they offered Gandolfo as surety, Gandolfo signing the document above recited. Some few weeks afterwards Bucholtz entered into an agreement for the working of the mining property with the other defendants except Gandolfo, buying out the interest of Lofstrom. He then signed the guaranty along with Gandolfo, which guaranty has remained in possession of plaintiff ever since. Lofstrom swears that on this change of business arrangements, the authorized agent of plaintiff—Carmack—released him from his liability as a debtor and substituted Bucholtz in lieu of him. This Carmack denies absolutely. There is of course here directly contradictory testimony. There is no doubt that Bucholtz entered into the arrangement about the time when Lofstrom says he went out, and that Bucholtz signed the undertaking subsequent to the signing of Gandolfo. I do not think this is sufficient corroboration of Lofstrom's

story to justify me in refusing to accept the sworn, positive statement of Carmack that he did not release Lofstrom at all. Lofstrom did not defend the action; but the defendant Gandolfo seeks to escape liability on account of the release of Lofstrom and the substitution of Bucholtz. I do not think he has succeeded in proving that there was any release of Lofstrom. This guaranty was signed on 18th August, 1903, and about 15th October plaintiff took a note from Dahl for the full amount of the goods sold, $1,260, making the note payable on or before 1st August, 1904, being the date mentioned in the guaranty for the expiry of the credit. This note was signed by C. Dahl only, and Carmack, the agent of plaintiff, swears it was taken as collateral only, not with the intention of giving any time whatever to Dahl, and that he expressly reserved all rights as against the sureties. Defendants contend that by virtue of the 3 days of grace, which would make the note not suable until 4th August, the surety is released. That is the entire contention in this case, apart from the one regarding release of Lofstrom. There is no doubt that the giving of time by the taking of a promissory note without the consent of the surety releases the surety. But the principle that it must be the binding contract to give time does not apply here, it seems to me. This was a note taken after the delivery of the goods, more as an evidence of debt than as a security for the payment of it. It gives no additional security to the creditor, and it does not extend the time. I cannot conceive that the doctrine should be extended so far as to say that the giving of a note, running collateral with the ordinary liability upon the debt, and made payable upon the day when the guaranty for the ordinary debt expires, simply for the reason that 3 days of grace are allowed by law upon a note, implies such an extension of time as would release a surety. Evidence is given that Mr. Smith, acting as solicitor for Gandolfo, waited upon the plaintiff and demanded that he sue Dahl and Lofstrom on the debt. The plaintiff was not at all bound to sue. The surety was bound to take up his liability and pay it and take any action he might see fit himself. There is no evidence that the 3 days of grace prejudiced the surety at all; and again I doubt whether the taking of a collateral note from Dahl alone suspended the remedy of plaintiff as against the partners Dahl and Lofstrom upon the original debt. There is no evidence whatever that it was intended to be substituted

for the original contract and liability of the partners Dahl and Lofstrom. It was no more than a collateral undertaking on the part of Dahl himself, and I do not think that the doctrine of release by giving time to the debtor is applicable here simply because the note by virtue of our law has a 3 days' grace after maturity.

There will be judgment for plaintiff for the amount sued for with costs.

BRITISH COLUMBIA.

(VANCOUVER.)

DUFF, J. JUNE, 1905.

CHAMBERS.

McLAGAN v. McLAGAN.

Writ of Summons—Action for Revocation of Letters Probate —Practice—Affidavit Verifying Indorsement — Citation to Custodian of Letters Probate—Stay of Proceedings.

Application by defendant for an order setting aside the writ of summons on two grounds: first, that the rule requiring (in Probate actions) the filing of an affidavit verifying the indorsement on the writ of summons, had not been complied with; and second, that plaintiff had not complied with the rule of practice which requires that either prior to or simultaneously with the issue of the writ in an action brought for the purpose of revoking a probate, a citation shall be issued calling upon the person who has the probate to bring it in.

W. M. Griffin, for defendant.

D. G. McDonell, for plaintiff.

DUFF, J.:—With regard to the first ground, I intimated during the argument that, assuming the affidavit in this case to be insufficient, in my judgment it is not a case in which the proceeding should be invalidated by the order of the Court, but that the curative provisions of Order 70, Rule 1, ought to be applied.

With regard to the other objection, I have come to the conclusion that the rule of practice invoked is still in force

here. I think that the rule was established to serve a public purpose. I am not able to see that it is in any way required for the protection of the defendant. The enforcement of it prevents any improper use being made of the letters of administration or the probate by the person in possession of them while an action for revocation is pending; and that I should think is the object of the rule. However I am satisfied that non-compliance has not in this case caused any inconvenience, and I do not think the writ should be set aside; but the action should not be proceeded with until the rule has been complied with by the issue of a citation calling on the defendant to produce the probate in question; there will be an order staying the proceedings until that has been done, and the plaintiff must pay the costs.

BRITISH COLUMBIA.

(VICTORIA.)

DUFF, J. JUNE, 1905.

CHAMBERS.

RE WALLACE AND FLEWIN.

Mining Law — Petition to Cancel Water Record — Water Clauses Consolidation Act, sec. 36 — Practice — Filing Petition — "Proper Registry" — Venue — Power to Change.

Flewin, Gold Commissioner at Port Simpson, issued a water record to Keith & Hamilton under sec. 36 of the Water Clauses Consolidation Act. Wallace applied to cancel this record. His petition was filed in the Vancouver Registry, but before the case was set down for trial he made an ex parte application to HUNTER, C.J., in Chambers, at Victoria, to fix the trial at Victoria, and also change the venue from Vancouver to Victoria.

On the trial date, W. J. Bowser, K.C., for Keith & Hamilton, moved to set aside this ex parte order, on several grounds, the main one being under sec. 36 (d), viz., that, as the petition had been originally filed in the Vancouver Registry, the trial must take place in the county in which the pleadings had been filed, and that there was no jurisdiction in

the Court or the Chief Justice to change the venue; that but for sec. 36 there was no jurisdiction in the Supreme Court at all; that that section laid down the procedure, and that it was an exhaustive code so far as the hearing of the appeal was concerned; that the statute being explicit the trial must take place in the county. Further, under sec. 35 of the Supreme Court Act (ch. 15, 1903-4) the ex parte application to change the venue should have been made at Vancouver Registry, where pleadings originally filed, and not at Victoria Registry.

E. V. Bodwell, K.C. (W. E. Oliver with him), for the petitioners, submitted that the procedure in the case of appeal under the Act provided by sec. 36 was incomplete, and that in so far as it was incomplete the inherent procedure of the Court governed, and that the power of changing the venue is a part of the Court's inherent power as to procedure; that in any event the balance of convenience was in favour of a change.

DUFF, J.:—In giving judgment on this application I am expressing views which are the views of both the Chief Justice and myself.

The decision in Ross v. Thompson, 10 B. C. R. 177, settles this, that the right of appeal given by sec. 36 of the Water Clauses Consolidation Act, is in effect a right to have the question disposed of by the officer appealed from retried before a Judge of the County Court or before a Judge of the Supreme Court; and further, that the appropriate method of dealing with questions of fact on that appeal is by the examination and cross-examination of witnesses viva voce.

Now, the provisions of that section must be read in the light of that decision.

The contention made by Mr. Bowser is that the section referred to provides an exhaustive code of procedure. I am unable to agree. One sees at once, if one examines the section, that such a construction would lead to difficulties which one cannot suppose the legislature contemplated. For example, there is a power conferred upon the Gold Commissioner to summon and examine witnesses viva voce, but under sec. 36 no such power is given to the court of appeal. But, as, in accordance with the decision I have mentioned, the appropriate method by which before the court of appeal questions of fact are to be dealt with is the examination and

cross-examination of witnesses viva voce, it obviously follows that unless the Court have some power of summoning witnesses the section is entirely nugatory in so far as it purports to give an appeal on questions of fact.

One need not refer to all the difficulties arising on the construction proposed, but one further may be mentioned. Sub-section B. provides that "the petition shall be intituled in the matter of this Act and of the particular decision appealed from, and shall name as respondents persons who, before the Commissioner or Gold Commissioner, were adverse in point of interest to the appellant, and the Commissioner or Gold Commissioner, and shall along with the affidavit verifying the same, be filed in the proper registry within the one calendar month aforesaid." This is an ambiguous provision. For the moment I am not prepared to say what the phrase "proper registry" means. But on any admissible interpretation of that phrase the construction contended for by the respondents here would go far to defeat the plain object of the section. Assume that "proper registry" means the registry of the county or the judicial district in which is situate the office of the Gold Commissioner from whose decision the appeal is taken—and it occurs at once to one if that were the case, then unless there be some power in the Court to change the place of hearing, that the petitioner having filed his petition in that registry might in many cases have to wait for a very long period indeed before the appeal could be heard; in other words, it would lead in many cases to a denial of justice. On the other hand, assume that "proper registry" means the registry in which the petition ought to be filed, in accordance with the rules of the Supreme Court for the time being with regard to the commencement of actions,—and the effect of that construction would be that the petitioner would be entitled to file his notice in any registry in the province; then if there were no power to change the place of hearing, the petitioner would have it in his power to drag respondents from one end of the province to the other, and over that course of conduct the Court would have no control whatever.

I conclude that the narrow construction contended for by Mr. Bowser is not the true construction. I think that the reasonable view to take of the section is that—the Supreme Court having once become seised of the matter—all the powers of the Supreme Court, at all events all the inherent powers of the Supreme Court, which may be necessary to

effectuate the object of the petition, namely, the bringing of the appeal to an effectual hearing and disposition, may be exercised. The language of James, L.J., read by Mr. Bodwell from the judgment in Dale's Case, 6 Q. B. D. at 450, seems to me to be exactly applicable: "It was strongly urged that this was a new jurisdiction and a new procedure. According to my view of the case, that is not material, because if a new jurisdiction is given to an existing court—that is to say, a jurisdiction to deal with some new matters in a different mode and with a different procedure—if that jurisdiction be so given to a well-known Court, with well-known modes of procedure, with well-known modes of enforcing its orders, it must, unless the contrary be expressly or plainly implied, be given to that Court to be exercised according to its general inherent powers of dealing with the matters which are within its cognizance."

The case cited, Itchin Bridge Co. v. Local Board of Health of Southampton, 27 L. J. Q. B. 128, is authority, if authority be needed, that the control of the time and place of the trial or hearing of actions or proceedings pending before the Court is one of the inherent powers of the Court.

Now, with respect to the further point raised by Mr. Bowser—the contention that the petition having been filed in Vancouver, the order of the Chief Justice ought to be set aside because the application could only be made there. It has been held, I understand, that a summons must be heard at the place where the registry is situated in which the action or proceeding is domiciled; that is based on sec. 35 of the Supreme Court Act, which provides that "a writ of summons for the commencement of an action in the Court shall be issued by a district registrar when thereunto required, and in such action and in any cause or matter pending in his registry all such proceedings as may and ought to be taken by the respective parties thereto, and as are authorized to be taken in any action, cause, or matter of a like nature, by Rules of Court, shall be taken and recorded in the registry out of which the writ of summons may have been issued."

I am not prepared to say that if the matter were res integra I should agree with the view that the hearing of a summons in Chambers is a proceeding in a registry. But, assuming that to be so, it certainly cannot be said, in my judgment, that the hearing of an application to this Court is a proceeding in a registry. In the case of Raser v. McQuade

the contention was advanced that the action having been commenced, and the trial having taken place in Victoria, and notice of appeal having been given for a sitting of the full Court in Victoria, the full Court sitting in Vancouver had no jurisdiction to hear the appeal, the suggestion being that the hearing of an appeal by the full Court was a proceeding in a registry within the meaning of sec. 35, supra. That was, of course, the reductio ad absurdum of the proposition that a hearing before the Court is a proceeding in a registry; and it was held not to be so. In this respect I see no distinction in principle between the hearing of an appeal before the full Court or the trial of an action and the hearing of a Court motion.

The application is dismissed.

BRITISH COLUMBIA.

(VICTORIA.)

DUFF, J. JULY 14TH, 1905.

CHAMBERS.

RE MELLOR.

Husband and Wife—Married Women's Property Act—Summary Application for Delivery up of Title Deeds—Land Registry Act Amendment Act, 1905, sec. 46.

A summary application was made by a husband, under sec. 33 of the Married Women's Property Act, for an order directing the delivery up to him of the title deeds which were supposed to be in the wife's possession.

The wife was, at the time of the application, the registered owner of the property, which she had acquired by conveyance from the husband. Subsequently she had executed a deed which she understood to be a re-conveyance, but neither the husband nor the solicitor who prepared the deed had any recollection of it, and the deed itself could not be found.

This deed having been executed before the passing of the Land Registry Act Amendment Act, 1905, counsel's attention was called to sec. 46 of that enactment, and argument requested on the question whether, under that section, the

deed not having been registered prior to the passing of the Act, it was open to the Court to consider any evidence as to the existence or contents of the document.

"46. Instruments executed before and taking effect before the coming into force of this Act, transferring, charging, dealing with, or affecting land or any estate or interest therein, unless registered before the coming into force of this Act (except a leasehold interest in possession for a term not exceeding three years), shall not be receivable by the Court, or any Court of law, or any registrar or examiner of titles, as evidence or proof of the title of any person to such land, as against the title of any person to the same land, registered under the provisions of this Act, except in an action before the Court questioning the registered title to such land, in which action a plea of fraud is raised wherein the registered owner has participated or colluded."

W. J. Taylor, K.C., for the husband.

A. E. McPhillips, K.C., for the wife.

DUFF, J., gave no decision on the point, but said that the construction of sec. 46, as applied to the facts before him, must be determined before he could decide whether the husband was entitled to the delivery up of the title deeds. That question, involving the applicant's title and the construction of this new and apparently far-reaching enactment, was not, in his judgment, one of the class of questions which ought to be decided in the exercise of the summary jurisdiction conferred by sec. 33 of the Married Women's Property Act. No order was made on this branch of the husband's application.

MANITOBA.

RICHARDS, J. JULY 25TH, 1905.

TRIAL.

HEBERT v. HAREL.

Promissory Notes — Action on — Defence — Payment — Forgery—Conflicting Evidence—Onus—Laches.

Action on certain promissory notes, alleged by plaintiff to have been made by Henri Harel the elder and Henri Harel

the younger, who were the original defendants. The action was brought in 1898 but allowed to stand. About 7th May, 1902, the elder Harel, who was the only defendant possessed of means, died. His executor was made a party defendant in 1903. Both of the Harels were illiterate.

The defence was that on 13th May, 1897, the elder Harel paid off all the then indebtedness of the defendants to the plaintiff, and that the defendants did not, nor did either of them, make the notes of $234.35 and $30, two of those sued on, and which two purported to have been made on that date (13th May, 1897). All of the notes sued on were then overdue.

A. Monkman and H. Nason, for plaintiff.

A. J. H. Dubuc, for defendants.

RICHARDS, J:—The evidence is conflicting. Plaintiff gave his testimony very badly, and in a manner that did not inspire belief in his veracity. Everything turns on what happened at an interview between plaintiff and his brother and the Harels and some others, at the elder Harel's house, on 13th May, 1897, at which interview it is alleged by plaintiff that the notes of that date were made, and by the defence that plaintiff was settled with in full, and no notes given or further liability incurred.

One of the signatures as witness to the notes of 13th May, 1897, purports to be that of "Cecile Touron," now the wife of the surviving original defendant. She swore positively at the trial that she had not signed the notes and that none were then made. She was then directed to sign her maiden name. She did so on a piece of paper put in as exhibit 8. There is a resemblance between that signature and the one on the notes. But the surname is wrongly spelled in the signature to the notes. It is not likely that she would have intentionally misspelled it, if written by her on 13th May, 1897, and it is not likely that she did not then know how to spell it.

No expert evidence was called to try to shew that the signature on the note was by the writer of exhibit 8, and I do not think that if there had been I should have held it to be proved. The great bulk of the evidence is in favour of defendant's contention. I felt suspicious as to the truthfulness of every one of the witnesses except Desourdy and Theroux, whose testimony was immaterial.

The onus, however, was on plaintiff, and the bulk of the testimony was adverse to his claim. He chose to let this suit lie, without bringing it to trial, for a number of years, and until after the death of the elder Harel, though that death did not occur till nearly four years after the action was begun. Under those circumstances he should prove his claim with more than usual clearness. That he has not done.

It seems to me, on the contrary, that the weight of evidence supports the contention of the defence, that on 13th May, 1897, plaintiff was paid in full, and that no further liability to him was incurred.

There will be judgment for defendants with costs.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. JUNE 2ND, 1905.

CHAMBERS.

IVERSON v. ENWRIGHT.

Judgment Debtor — Motion to Commit — Imperial Debtors Act in Force in Territories—Non-payment of Judgment —Examination of Debtor—Refusal to Disclose Property.

Summons to commit defendant to gaol for 6 weeks for non-payment of the amount of the judgment recovered by plaintiff against him under the Debtors Act, 1869, sec. 5 (Imp.) 32 & 33 Vict. ch. 62, and further to commit him for refusal to answer certain questions upon his examination as a judgment debtor. It appeared from the examination already had, that he had not paid any part of the judgment amounting to $290, but that he had in his house bank notes to the amount of between $600 and $700. He refused to say in what part of the house the notes were, and also refused to give any information with regard to certain cattle which he had had about the time the judgment was entered, but which he no longer had at the time of the examination.

O. M. Biggar, Edmonton, for plaintiff.

J. R. Boyle, Edmonton, for defendant. The Debtors Act is not in force in the Territories. All the information necessary was given about the bank notes. Defendant was not

obliged to give an account of the property he had disposed of under Rule 380, clause 1—clause 2 alone applying to property no longer owned by the debtor.

Biggar, in reply. The object of the examination is to enable the sheriff to seize, and to be of any use, the exact whereabouts of the money should have been stated. Even if Rule 380 (1) is interpreted as suggested, the order nevertheless provides for a full examination with regard to past as well as to present property, and to refuse to answer upon the examination was not the proper way to object to it.

SCOTT, J. (oral):—On the authority of Re Bremner, 6 Man. L. R. 73, I think the Debtors Act is clearly in force in the Territories, and that plaintiff is entitled to the order to commit defendant for 6 weeks. With regard to the questions left unanswered, I think the exact location of the bank notes should have been given, and that the questions in regard to past property should clearly also have been answered under the order on which the examination was held. I am inclined to think, although it is not necessary to so decide for the purpose of this application, that that order was properly taken out in its present form, the object of the Rule being to get full discovery from the defendant as to his property.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. JULY 26TH, 1905.

CHAMBERS.

RE HARDISTY AND BISHOPRIC.

Landlord and Tenant—Overholding Tenant—Acceptance of Rent—Creation of Tenancy from Year to Year—Notice to Quit—Forfeiture for Non-payment of Rent.

Application by Hardisty, the landlord, for an order that Bishopric, the tenant, deliver up possession of premises in his occupation.

J. R. Boyle, Edmonton, for the landlord.

J. E. Wallbridge, Edmonton, for the tenant.

SCOTT, J.:—In a previous application made by Hardisty against the same tenant, I held in my judgment delivered on 29th December, 1904, that the tenant entered into possession of the premises on 1st January, 1903, under a lease thereof for one year from that date, and that he was not, as was contended by the landlord, in possession under a lease from month to month from August, 1903.

The grounds of the present application are: (1) that the tenancy was determined on 1st July instant by a notice to quit on that date, which was given to the tenant on 29th December, 1904; and (2) that the tenant has not paid the rent of the premises for the month of July, 1903, and June, 1905.

The tenant having remained in possession of the premises after the expiration of the term for which he leased the premises and up to the present time, and the landlord having accepted rent from him after the expiration of the term, the tenant must, in the absence of any new agreement, be presumed to be now in occupation thereof as a tenant from year to year. Such a tenancy can only be determined by the landlord at the end of some year of the tenancy by half a year's notice. As the tenancy expired on the 1st January, it follows that the notice now relied upon was not a notice to determine the tenancy at the expiration of some such year, and it is therefore inoperative.

It appears to be open to doubt whether the rent for the month of July, 1903, is in arrear, but it is unnecessary for me to decide that question, owing to the fact that any forfeiture caused by its non-payment has been waived by the acceptance by the landlord of rent which accrued subsequent to that date. See Woodfall's Landlord & Tenant, 15th ed., p. 342.

As to the right of re-entry for non-payment of the rent for June, 1905, it appears to be conceded by counsel for the parties that the lease between the parties was subject to the implied proviso contained in sec. 69 (B) of the Land Titles Act. That proviso gives the landlord the right of re-entry for non-payment only in cases where such rent has been in arrear for the space of two calendar months. As this application was made on 6th July instant, it follows that the rent for the previous month could not then have been in arrear for two calendar months.

The application is dismissed with costs.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. JULY 27TH, 1905.

CHAMBERS.

A. MACDONALD CO. v. LOGAN.

Pleading—Counterclaim — Exclusion — Action for Price of Goods—Counterclaim for Malicious Prosecution—Parties —Added Defendant by Cunterclaim—Convenience.

Application by plaintiffs to exclude the counterclaim filed by defendant, on the ground that the claim made by the counterclaim should not be disposed of by way of counterclaim, and that the same could not be conveniently disposed of by way of counterclaim.

O. M. Biggar, Edmonton, for plaintiffs.

C. F. Newell, Edmonton, for defendant.

SCOTT, J.:—Plaintiffs' claim in the action is for the price of goods sold and delivered by them and others to defendant. The counterclaim is against plaintiffs and one Cooper, who is alleged to be plaintiffs' manager at Edmonton, and is a claim for damages for malicious prosecution, it being alleged that Cooper, in the course of his employment as such manager, falsely, maliciously, and without reasonable and probable cause, swore certain informations against the defendant charging her with transferring her property and removing part thereof with intent to defraud her creditors or plaintiffs.

The only authority I can find for a counterclaim by a defendant against a plaintiff and a person who is not a party to the action is sub-sec. 3 of sec. 8 of the Judicature Ordinance, and that authority is restricted to cases where the relief claimed against the plaintiff and such other person relates to or is connected with the original subject of the cause or matter.

Rule 110, which is relied upon by defendant, in my opinion applies only to counterclaim against a plaintiff alone, and is therefore inapplicable to the present case.

I think it cannot reasonably be concluded that a claim for malicious prosecution relates to or is in any way connected with a claim for goods sold and delivered, and I therefore think that the counterclaim in this case should not be allowed, I am also of opinion that, even if such a counterclaim were authorized by the practice, it is one that could not conveniently be disposed of in the action, and that therefore the defendant should not be permitted to avail himself of it.

The order will go to strike out the counterclaim with costs of the application to the plaintiff in any event on final taxation.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. JULY 27TH, 1905.

CHAMBERS.

DIEHL v. WALLACE.

Bankruptcy and Insolvency — Voluntary Assignment for Benefit of Creditors — Action by Assignee to Set aside Mortgage Made by Assignor—Cause of Action.

Application by plaintiffs to strike out defendant's statement of defence, on the ground that it disclosed no reasonable defence. Upon the hearing of the application, it was agreed by counsel that it should be treated as a motion for judgment.

O. M. Biggar, Edmonton, for plaintiffs.

N. D. Beck, K.C., for defendant.

SCOTT, J.:—Plaintiffs, who sue merely as assignees for the benefit of creditors of the firm of Hamilton & Corcoran, seek to have declared null and void as against them, as such assignees, and as against the creditors of Hamilton & Corcoran, a mortgage made by that firm to defendant prior to the assignment to plaintiffs, on the ground that such mortgage was made with intent to defeat and delay such creditors, and for the purpose of giving the defendant a preference over the other creditors.

By his defence the defendant raises the question of law that the statement of claim discloses no cause of action on the part of plaintiffs, inasmuch as they, being voluntary assignees, have no greater rights than their assignor, and therefore they have no locus standi to attack the mortgage.

In my opinion Burland v. Moffat, 11 S. C. R. 76, is conclusive against plaintiffs' right to maintain the action. Strong, J., in his judgment in that case, shews that it is well settled in England as well as in Ontario that a debtor cannot institute an action to set aside a deed made by him on the ground that it is fraudulent as against his creditors, and that his assignees can stand in no better position.

It is true that the Privy Council in Porteous v. Reynar, 13 App. Cas. 120, dissented from the view expressed by the Supreme Court in Burland v. Moffat as to the effect of an article of the Civil Code of the Province of Quebec, which was considered in that case, but I do not understand that the prinicple of law which I have referred to was in any way questioned.

I give judgment for defendant with costs.

MANITOBA.

JULY 14TH, 1905.

FULL COURT.

CARROLL v. McVICAR.

Mechanics' Liens — Sub-contractor — Liability of Owner — Failure to Retain Percentage — Entire Contract — Time for Filing Lien.

Plaintiff was employed by John Devereaux, a contractor, to put in a furnace and do work at a house which Devereaux was modernizing for McVicar: as plaintiff had not been paid by Devereaux, he filed a mechanic's lien, and this suit was instituted to enforce the lien.

McVicar filed a defence stating that no sum was payable or due by him to Devereaux, as he had paid the latter all that was owing to him, but it appeared that Devereaux failed to pay plaintiff the amount he owed for his work.

The action was tried before DUBUC, C.J., who delivered the following judgment:—

DUBUC, C.J.:—It was contended on behalf of defendant that the agreement between the parties was an entire contract, and that defendant was not bound to pay anything to the contractor or sub-contractor until the whole work was performed. Munro v. Butt, 8 E. & B. 737, Whitaker v. Dunn, 3 Times L. R. 602, Sumpter v. Hedges, [1898] 1 Q. B. 673, and Coatsworth v. City of Toronto, 10 C. P. 73, were quoted in support of the proposition, but they were cases in which the contractor who had abandoned his contract or failed to complete the work, had brought the action himself, and there was no question of lien by sub-contractor or workman involved; I do not think they apply to this case.

The case of Re Sear and Woods, 23 O. R. 474, is more in point and seems to support the view of defendant; but the statute was amended, and in Russell v. French, 28 O. R. 215, it was held that, under sec. 10 of the Mechanics' Lien and Wage Earners' Lien Act, 59 Vict. ch. 35 (O.), it is the duty of the owner to retain out of the payments to be made to the contractor, as the work progresses, 20 per cent. of the value of the work done and materials provided, to form a fund for the payment of the lien-holders, not subject to be affected by the failure of the contractor to perform his contract. Meredith, C.J., says in that case: "The cases of Goddard v. Coulson, 10 A. R. 7, Re Cornish, 6 O. R. 259, and Re Sear and Woods, 23 O. R. 474, are not now applicable owing to the change in the statute." Speaking of the 20 per cent. to be retained by the owner, he says: "That percentage it was the duty of the owner to retain out of the payments to be made to the contractor, and it appears to have been intended to form a fund for the payment of the lien-holders, and not subject to be affected by the failure of the contractor to perform his contract." Rose, J., uses similar language.

Section 9 of our Act, R. S. M. ch. 110, is substantially the same as sec. 10 of 59 Vict. ch. 35 (O.), which is incorporated in R. S. O. 1897 ch. 153, sec. 11 (2).

I have been referred by defendant's counsel to McArthur v. Dewar, 3 Man. L. R. 72; but that was decided in 1885, when the statute was not the same as our present Act.

Mr. Robson, for defendant, argues that this applies to contracts where payments are to be made as the work progresses, but not to a contract, like the present, where the work

is to be paid for after the contract is fully performed. But sec. 9 of our Act says that in all cases the person primarily liable upon any contract under and by virtue of which a lien may arise, "shall, as the work is done or materials are furnished under any contract, deduct from any payment to be made by him in respect of such contract, and retain for a period of 30 days after the completion or abandonment of the contract, 20 per cent. of the value of the work, service, and materials actually done, placed, or furnished as defined by the 4th section of this Act, and such value shall be calculated on the basis of the price to be paid for the whole contract."

No distinction is made between a contract where payments are to be made as the work progresses and a contract where the work is to be paid for after completion thereof.

The object of this and other provisions of the Act is clearly to protect the sub-contractor and workman in being secured for payment of work done and materials furnished, against the failure by insolvency or otherwise of the contractor to pay for the same. That protection is not given for the whole amount of his claim, but to the extent of 20 per cent. of the work and materials actually done and provided on the premises of the owner. And the statute makes it a duty for the owner or person primarily liable to retain said percentage for the purpose in question; and if he fails to do so, he becomes responsible for the consequence. To hold otherwise would, in many cases, have the effect of defeating the object and purpose of the Act, as by some understanding between the contractor and the owner, or by the fraud or insolvency of the contractor, the sub-contractor or workman would be left without remedy for any portion of his claim. That is exactly what the statute has been passed to provide against.

In this case it is admitted that plaintiff, a sub-contractor, has done his work in a workmanlike manner. The whole contract price was $1,025. The defendant McVicar, who was the owner, paid to the contractor Devereaux, from time to time, as the work progressed, different sums amounting to $750. He was not bound to do so, but he did it to assist the contractor, who appeared not to be able to go on with the work without such voluntary payments from the owner. The masonry work intrusted to the sub-contractor Dunthorn, was done in a very defective manner, and it was shewn that it would cost $275 to have it properly done. McVicar has

retained that amount out of the whole contract price. According to the requirement of the statutes, he should have retained 20 per cent. out of that sum of $750, for the protection of sub-contractors who might file liens to secure their claims. That would make $150 available for the purpose. It is shewn that plaintiff's lien is the only one filed and enforceable. I think he is entitled to have his lien declared valid for that sum of $150.

It is contended on behalf of defendant that plaintiff's work was done under three different contracts, and that, as to the first one, the putting up of the furnace, his lien was not filed within the time required. He swears that the putting up of the furnace, of the soft water tank, and of the pump, although ordered at different times, was done by him as one job. I do not think it would be proper to hold that, when a man is doing such work, being ordered or requested to do one thing and then another, in his line of business, he should be required, in order to secure his payment, to file a lien after completing each piece of work. His doing so when he has completed his work ought to be considered sufficient.

It may be unfortunate for McVicar to have to pay more for having his work completed than he had agreed to do under his contract, on account of some of the work being defectively done by a particular sub-contractor. But he was living in the house on which the work was done. As he admitted himself, he saw that the masonry work was badly done and called the attention of the contractor to it, before he made to him the last payment of $100. That was in December. He was willing to wait until the spring to have the work done in a proper manner. He gave that amount to Devereaux to be paid to plaintiff. If Devereaux deceived him in not paying the money over to plaintiff as he agreed to do, it is not plaintiff's fault, and he should not be made to suffer for Devereaux's deceit towards McVicar.

There should be judgment for the plaintiff, declaring his lien valid for the sum of $150, with costs, such lien to be enforced in the usual manner.

From this judgment defendant appealed to the full Court.

H. A. Robson, for defendant.

G. A. Stewart Potts, for plaintiff.

The judgment of the Court (RICHARDS and PERDUE, JJ.), was delivered by

RICHARDS, J.:—In this case I adopt, in its entirety, the judgment delivered by the Chief Justice, and have nothing to add to it, as I think it deals fully with the questions both of law and of fact.

I think the appeal should be dismissed with costs.

MANITOBA.

RICHARDS, J. JULY 25TH, 1905.

TRIAL.

PHELAN v. FRANKLIN.

Mechanics' Liens—Workman—Liability of Owner—Failure to Retain Percentage — Pay List — Builders and Workmen's Act—Claim under $20.

Action on a workman's lien for $25.50.

Plaintiff worked, under employment of defendant Franklin, on a building that Franklin was repairing for defendant Shinbane,. The contract price for the work and extras, was $65. Shinbane paid $55 of this to Franklin, or on Franklin's orders. Franklin abandoned the work, and Shinbane paid $24.15 to others to complete the work that Franklin had contracted to perform.

The plaintiff was Franklin's workman, and as such did work on the building to Shinbane's knowledge; his wages for that work came to $35.50; of this he received $10, leaving the balance of $25.50 unpaid. He registered a lien and brought this action to enforce it.

W. M. Crichton, for plaintiff.

J. A. Machray, for defendant.

RICHARDS, J.:—Following the decision of Chief Justice Dubuc in Carroll v. McVicar, ante, which was affirmed by the full Court, I think it must be held that defendant Shinbane should have held back 20 per cent. of the $55, to meet liens. If he chose to overpay Franklin, he did so at his own risk. I assume that he knew what he was doing. Twenty per

cent. of the amount he did pay, is $11, and I hold, therefore, that plaintiff has a lien for that amount.

It was argued for plaintiff that, as a pay list was not kept by Franklin, as required by the Builders and Workmen's Act, the plaintiff should be held entitled to recover the full balance of $25.50 due him.

That Act cannot be considered in this action. The suit is brought under the Mechanics' and Wage Earners' Lien Act, which gives a special statutory remedy against the land of a party not liable in contract, for the debt, and fixes rules by which the extent of this remedy is limited.

The fact that where a pay list is not kept the Builders and Workmen's Act also gives a statutory personal remedy against owners of land, cannot in any way enlarge the remedy under the other Act.

The Act under which this action was brought says that no lien shall exist under it, "for any claim under the sum of $20."

It seems to me that the word "claim" as so used means the amount actually due to the contractor, sub-contractor, or workman, under his contract or employment, and is not intended to be limited by the amount to which the right or remedy against the land may on inquiry be found to be limited.

I think, therefore, that, though the remedy against the land is limited to $11, yet the fact that plaintiff had a balance of over $20 due him for work on the property, entitled him to file his lien and bring the action.

There will be judgment for plaintiff, declaring his lien to be valid against the land to the extent of $11, with costs.

MANITOBA.

RICHARDS, J. JULY 25TH, 1905.

TRIAL.

MILLS v. MANITOBA COMMISSION CO.

Sale of Goods—Sale by Sample — Knowledge by Vendor of Destination of Goods—Sale of Goods Act—Variation of Contract — Buyer's Risk — Goods Delivered not up to Sample.

Defendants, by their manager, Paterson, sold to plaintiff two car-loads of barley, by sample. Paterson knew that

plaintiff proposed to re-sell it to the Calgary Brewing and Malting Company, a company doing business at Calgary, who would only need it for malting purposes. It was sent to the Calgary Company, who refused one car of it, upon the ground that it did not correspond with the sample, and was unfit for malting purposes. The refused barley was then sold at Calgary at a loss.

Plaintiff brought this action to recover damages for his loss and loss of profits, alleging that the sample was good for malting purposes, but that the rejected barley was not.

H. M. Howell, K.C., and T. G. Mathers, for plaintiff.

A. B. Hudson and E. W. Marlatt, for defendants.

RICHARDS, J.:—At the trial plaintiff seemed desirous of giving his evidence truthfully, But he shewed a confused and unreliable memory.

At the time of the dealings between plaintiff and defendants there was considerable ill feeling between Paterson and the manager of the Calgary Company, over some past transactions, and they did not trust each other. It was testified by Paterson and by another witness, Guy, that, when Paterson, before closing the sale to plaintiff, learned that plaintiff intended to sell to the Calgary Company, he told plaintiff that he, Paterson, had had trouble with that company, and that he would not take the risk of their accepting the barley, but that, if plaintiff sent them the barley, he must do so at his own risk.

Plaintiff denies having been so told. But I think that he was and that he chose to take the risk and has since forgotten the warning. If I am correct in that finding, the parties, within the meaning of sec. 54 of the Sale of Goods Act, R. S. M. 1902 ch. 152, varied, by express agreement or by their course of dealing, any implication that otherwise in view of Paterson's knowledge of the destination of the barley, might have arisen under sec. 17, sub-sec. (a), clause (i), that the bulk corresponded with the sample for malting purposes.

The question, therefore, of whether it did so correspond, need not now be considered.

There will be judgment for defendants, with costs.

MANITOBA.

RICHARDS, J. JULY 25TH, 1905.

TRIAL.

HENRY v. NELSON.

Principal and Agent—Accounts—Sale of Goods—Onus.

Plaintiff provided a quantity of stone, which was sold by defendant to the corporation of the city of Winnipeg. Plaintiff alleged that defendant was his agent in making the sales to the corporation, and represented to him that those sales were made at prices less than the prices actually paid by the corporation, and that defendant only accounted to him on the basis of the lower prices. He asked for an account of the sums actually received, and for payment by defendant of the difference between what defendant received and what he accounted for. Plaintiff also claimed $15.50 for a monumental stone, which defendant ordered from him, and which he said he delivered. He also alleged that defendant owed him, as surviving partner of the firm of William Henry & Son, a balance of $46.88.

C. P. Wilson and J. F. Fisher, for plaintiff.

J. A. M. Aikins, K.C., and A. H. S. Murray, for defendant.

RICHARDS, J.:—Defendant contends, as to the stone sold to the city corporation, that he was not plaintiff's agent, but that he, himself, bought from plaintiff at the lower prices and paid plaintiff in full, and that his sale to the corporation was on his own behalf only. He alleges that the monumental stone furnished was not such as he ordered, and that he did not accept it. He further denies any indebtedness, on his part, to the late firm of William Henry & Son.

There is nothing to be gained by discussing the evidence in detail.

The onus is on plaintiff, and it seems to me that he has failed to establish any of his claims.

There will be judgment for defendant with costs.

MANITOBA.

RICHARDS, J. JULY 25TH, 1905.

TRIAL.

BROWN v. HOARE.

Vendor and Purchaser — Contract to Purchase Plaintiff's Interest in Land — Specific Performance — Assignment and Delivery of Plaintiff's Agreements with Owner — Dispute as to Terms of Contract—Waiver—Costs.

Suit for specific performance.

Defendant made two separate agreements to buy two half sections of land from the Canadian Pacific Railway Company at the price of $3 per acre. Upon each purchase he paid $160 down, and received a receipt, signed on behalf of the company's land commissioner, acknowledging such payment as a first payment on the land, which it identified, and stating the total price per acre, and concluding thus: "This being an interim receipt subject to the conditions of the company and pending completion of agreement for the purchase of said land."

Thereafter, plaintiff agreed with defendant to buy defendant's interest in these half sections for $1,440, and, as between him and defendant, to assume the payment of all further sums coming due to the company under the sale to defendant. The $1,440 was to be paid, $720 cash down, and $720 in 30 days, on receiving assignments from defendant of the agreements of sale from the company to defendant.

Plaintiff paid the first $720. He refused to pay the second $720 until the defendant, in addition to assigning to him the company's formal agreements, should also deliver those agreements with the assignments. The company agreements had not then been executed by the company. They, in fact, remained unexecuted for several months thereafter. Defendant offered to deliver documents executed by him, purporting to assign the expected company agreements and to deliver the interm receipts. He, defendant, refused to await the issue of the company agreements, and contended that delivery of the receipts and of his assignments, as above,

would satisfy his part of his agreement with plaintiff. On plaintiff's continued refusal to accept that as performance, defendant threatened to cancel his sale to plaintiff.

Defendant made no effort to hasten the issue of the company agreements. The evidence shewed that the company, if asked so to do, would hasten the issue of their formal agreements, in order to oblige their vendees who were selling again. The defendant might have got the company agreements issued within the 30 days, if he had stated to the company's officials that haste was essential.

After the company agreements were issued, defendant refused to carry out his sale to plaintiff.

J. A. M. Aikins, K.C., and H. A. Robson, for plaintiff.

C. P. Wilson and J. A. Machray, for defendant.

RICHARDS, J.:—It seems to me that defendant specifically undertook to deliver to plaintiff assignments of the company agreements, and that, as such agreements would thereby become plaintiff's property, defendant by implication necessarily undertook that, at the time of so assigning, those agreements would be in existence, and would be delivered with the assignments. Assignments executed before the delivery by the company of the executed agreements, might pass the right to receive those agreements when executed. But that would leave plaintiff to take the risk of losing the bulk of his payments to defendant, or bringing an action, if the company should choose not to execute and deliver. There was no reason why he should take that risk, however slight it might be.

One ground that had weight with defendant, in impelling him to the course he took, was his expectation that if plaintiff accepted the assignments before the company issued their agreements, the company would, on being notified thereof, issue their agreements direct to plaintiff as if he were their purchaser, and defendant would thereby avoid becoming personally liable to the company for the payment of the postponed instalments of purchase money.

But plaintiff's agreement with defendant did not oblige him to accept that position, and he could not have compelled the company to make the agreements to him direct.

It was argued, for the defence, that the interim receipts, combined with certain applications, signed on defendant's behalf by his lawful attorney, asking the company to sell the

lands to him, formed a contract by the company, enforceable by defendant, or his assignee, and that, therefore, when defendant offered to assign to plaintiff as agreed, he was in a position to make title to plaintiff, which title plaintiff should have accepted, and that his refusal to accept justified defendant in considering the contract with plaintiff as at an end.

The existence of those applications was not disclosed to plaintiff, nor was any suggestion made to him, before this action, that defendant had a title in that way. It was simply contended that, as stated above, the delivery of the assignments and of the receipts satisfied defendant's obligation under his contract with plaintiff.

In any case, the argument is founded on what appears to me a misunderstanding of the contract between plaintiff and defendant. That contract was not one by which defendant agreed generally to make title, but rather one by which it was agreed that the assignments (and, by implication, the delivery) of the executed formal agreements, when issued by the company, should be accepted as making title, or in lieu of making title. Had defendant produced the executed company agreements and the assignments, it would not, I think, have been open to plaintiff to ask any further proofs of title, such as evidence that the company had title.

After making his contract with defendant, plaintiff agreed to sell one of the half sections to one Blaser, who has gone on to the land and improved it. The contract with Blaser was for a different price, and on other terms, and was not an assignment to him of plaintiff's rights under plaintiff's agreement with defendant.

It was alleged that, by that action of plaintiff and his vendee, plaintiff had waived his right to dispute defendant's title. I doubt if that argument would be good where, in lieu of defendant agreeing to make title generally, plaintiff, as in this case, agreed to accept specific things. But it cannot be raised here, as no waiver has been pleaded.

After his refusal to carry out his sale to plaintiff, defendant entered into an agreement to sell, to a Mr. Wark, the land so occupied by Blaser; Mr. Wark knew of plaintiff's claim and took the risk. The land has not been conveyed to him. I see no ground for holding that sale to be a bar to ordering defendant to specifically perform his agreement with plaintiff. It is urged that Wark should have been

made a party to this action. If defendant meant to rely on that, he should have raised the question by his pleadings. But he has not done so.

It was argued at the trial that no question of laches in bringing the action should be raised.

There will be judgment, therefore, declaring that plaintiff is entitled to specific performance by defendant of the agreement, and that on payment by plaintiff to defendant of the remaining $720 and of all payments made by defendant to the company on the lands since the first ones of $160 per half section, and of all taxes, if any, paid by defendant since the agreement between him and plaintiff (less plaintiff's costs of this action), defendant is to deliver to plaintiff the company agreements and duly executed assignments thereof by defendant to plaintiff, which assignments are to contain a covenant by plaintiff to assume and pay all further sums coming due to the railway company, and to indemnify and save harmless defendant against the same. If the amounts above provided to be paid by plaintiff are not agreed upon within 2 weeks from the giving of this judgment, there will be a reference to the Master to ascertain and settle them.

Plaintiff's costs of this action, including those of the reference, if had, are to be taxed and deducted, as above stated, from the amount payable by plaintiff to defendant. If they exceed that amount, the excess is to be paid by defendant to plaintiff.

MANITOBA.

RICHARDS, J. JULY 25TH, 1905.

TRIAL.

BATER v. BROWN.

Building Contract—Payment of Price—Time—Discrepancy between Supposed Duplicates of Written Contract—Extras—Delay in Work—Inferior Quality—Failure to Supply Money to Pay Workmen—Mechanics' Lien—Judgment—Reference—Account—Secret Commissions.

Suit to enforce a mechanics' lien.

C. W. Bradshaw and R. G. Affleck, for plaintiffs.

E. L. Taylor and S. R. Laidlaw, for defendants.

RICHARDS, J.:—The plaintiffs, who, to the knowledge of the defendants, were journeymen carpenters with little or no capital, entered, at the request of the defendant Mary Brown, into a written contract to build for her, at the price of $800 each, four houses, each to be like the one she, Mary Brown, lived in on Selkirk avenue, being house numbered 514 on that avenue. The plaintiffs were not to paint the houses. Mrs. Brown was to advance half of the price when each house was closed in, and, if necessary, she was to advance money for the pay of plaintiffs' workmen between times.

The title to the land that the houses were to be built on was in the name of defendant Joseph Brown, who was Mary Brown's husband, and held the land for her.

The agreement was written out in duplicate by Mary Brown, and signed by her and by both plaintiffs. The plaintiffs kept one duplicate and Mary Brown the other. There was a discrepancy between them as to the time when half the contract price was to be paid.

The duplicate kept by the plaintiffs, which was exhibit 1, is, I think, the one that must be held binding. It is the only one that the plaintiffs read, and they intended to contract according to it, and Mrs. Brown should be held bound by it, as she wrote it out.

The lumber in the house, 514 Selkirk avenue, was of a rather low grade, the siding being of what is called No. 4 grade.

The plaintiffs wished to buy the lumber for the houses from the Keewatin Lumber Co., who had supplied the materials for No. 514. On trying to so buy they were refused credit unless Mary Brown would guarantee the account. She refused to do so, but offered to guarantee payment if the lumber were got from the Sprague Lumber Co., from whom she had frequently bought lumber for building, and on the plaintiffs consenting, she arranged with the latter company to give the plaintiffs the lumber, on her guarantee.

It was understood that the houses would be built during the winter of 1903 and 1904.

The plaintiffs built the houses and also built 4 outbuildings and put in 4 brick chimney thimbles, at Mrs. Brown's request. The outbuildings and thimbles were properly charged for as extras at $43.20.

A good deal of trouble and delay arose, owing to Mrs. Brown not providing money to pay wages, etc., as she had agreed to do, which left the plaintiffs unable to employ workmen for a good part of the time.

Mrs. Brown went to Ontario for the winter, and remained away till some time after the siding had been put on the houses.

The houses were left by the defendants unpainted for a long time after the siding was put on. Later on the defendants got them painted. But part, at least, of the painting was done very badly.

The plaintiffs, being unable to get a settlement with Mrs. Brown, filed a lien against the land on which the houses were built and brought this action to enforce it.

The defendants set up a number of objections to the plaintiffs' claim, the chief of which were that the plaintiffs caused them loss from delay and that the plaintiffs used a grade of siding of a poorer quality than had been agreed on, and put it on so negligently that it warped and shrunk to such an extent as to make it necessary to pull off the siding and re-side it with better material. The other objections are trivial, or were removed before the lien was filed.

The defendants should not be allowed for the delay. I find that it resulted from their not supplying the plaintiffs, as had been agreed, with money to keep the work going.

There was a great deal of evidence both ways as to the siding. But it was of the quality agreed on, and used in No. 514 Selkirk avenue, the house that the buildings were to be equal to. The defendants themselves chose the persons from whom it was to be bought, expecting to get a discount of 10 per cent., and intending to allow the plaintiffs the benefit of only half of that discount.

The defendant Joseph Brown is a stonemason by trade and well acquainted with building materials. He watched the progress of the work while his wife was in Ontario, and was admittedly her agent in her absence. He made no objection to the siding, or to the way it was being put on to the houses. A number of written notices were, prior to July, given to the plaintiffs by defendants, containing complaints as to the buildings. But, though the siding was put on in January, there was no written complaint as to it until July, and though the defendants assert that it ought to be taken off

and replaced with new siding, no attempt has been made to remove it.

Its present condition is not satisfactory, and there was a good deal of contradictory evidence as to the cause of that condition. The plaintiffs say that lumber of that grade will always shrink and warp seriously, if not painted as soon as it is put on to the houses.

Whatever the cause may be, I think that people who understand lumber and the building of houses as well as the defendants did, and who, for purposes of their own secret gain, insisted on choosing the source of its supply, must be held to have accepted it when they refrained for six months from objecting to its condition and quality.

Mr. Brown says that he never saw the houses while the siding was being put on. I am sorry to have to discredit him as to that. I feel no doubt that he saw it frequently, if not daily, during that period.

There will be judgment that the plaintiffs are entitled to $3,243.20 for the house and extras, less the amount paid by the defendants to the plaintiffs, or to the suppliers of materials for the plaintiffs.

There will be a reference to the Master to take an account of the sums paid by the defendants, and of all liens, if any, other than the plaintiffs' lien, which the defendants are compellable to pay, and therefore entitled to set off against the amount so due the plaintiffs, and to set the same and such other payments as aforesaid off against the amount above found due to the plaintiffs, and to find the balance, if any, that will then remain due by the defendants to the plaintiffs, with power to report any special circumstances.

In taking such accounts, the defendants are to account for all commissions, discounts, or deductions allowed them by any suppliers of materials.

The defendants also are not to be at liberty to charge the plaintiffs with discounts paid on promissory notes, or other negotiable instruments given to raise money, as it was the defendants' duty, under their contract with plaintiffs, to advance such moneys.

The costs, up to and including the trial, are to be taxed and are to be costs in the cause to plaintiffs in any event.

Further directions and the cost of the reference and of such further directions are reserved.

MANITOBA.

RICHARDS, J. JULY 29TH, 1905.

RE CROSS AND TOWN OF GLADSTONE.

Municipal Corporations—Local Option By-law — Procedure under Liquor License Act — Omission to give Notice of Place where By-law may be Seen — Omission to give Notice of Third Reading by Council—Fatal Irregularities —Quashing By-law—Costs.

Motion by R. L. Cross of Gladstone to quash by-law No. 126 of that town, being a local option by-law.

Among the objections taken to its validity were the two following:—

That the notice of the proposed voting on the by-law, published pursuant to sec. 66 of the Liquor License Act, did not state, as required by that section, that the proposed by-law, or a true copy of it, could be seen on file, until the day of taking the vote, at the office of the clerk of the municipality. And that no notice was published or given of the time when the by-law received its final consideration by the council.

Section 66 of the Act says: "The council shall, after the first and second readings of the proposed by-law and before the third reading and passing thereof, publish in some newspaper in the municipality, if one be published therein, and, if not, in the newspaper published nearest to such municipality, and in the Manitoba Gazette, a notice stating the object or purpose of the proposed by-law, that the same has been submitted to the council and has received its first and second readings, and that a vote thereon of the electors entitled to vote will be taken on the day and at the hour and place fixed under this Act, that the proposed by-law, or a true copy thereof, can be seen on file until the day of taking the vote at the office of the clerk of the municipality, and that the further consideration of the proposed by-law, after taking the said vote, is fixed for the time and place appointed therefor by the council naming such time and place," etc., etc.

In the present case the notice so published did not state that the by-law, or a true copy of it, could be seen at the office of the clerk. It made no reference to any time or place where the by-law, or a copy, could be seen.

The notice contained the following as to further consideration of the by-law:

"After the vote has been taken on said by-law, the further consideration of said by-law shall take place at the council chamber on the 1st day of May, A.D. 1905, at 7.30 o'clock p.m.

When the time so fixed for further consideration arrived it was ascertained by the council that Mr. Cross, the present applicant, had petitioned the Judge, under sec. 70 of the Act, for a recount of the votes. The recount did not take place until 23rd May. Section 73 of the Act provides that where a petition has been so presented, "the by-law shall not be read a third time and passed by the council until after the petition has been disposed of." The council, therefore, were not at liberty to deal with the third reading on 1st May, the date so advertised.

The minutes of the council meeting of 1st May were somewhat contradictory. But their effect was, apparently, to shew that the council decided not to then give the by-law its third reading, which was the only course open to them in view of sec. 73 above mentioned.

H. W. Whitla and G. A. Stewart Potts, for applicant.

T. G. Mathers, for the town corporation.

RICHARDS, J.:—As parties interested were entitled to attend when the by-law should be brought up for its third reading, the proper course for the council to pursue on 1st May, when they found they could not then deal with it, was to at least openly adjourn its further consideration till some fixed date and hour at some fixed place, and perhaps, to publish a notice of such adjournment for the benefit of such voters or parties interested and intending to oppose the third reading, as might from knowing of the petition and of the consequent inability of the council to then act in the matter, have refrained from attending the 1st May council meeting. No such adjournment, however, was had, and no further notice of further consideration was ever given. Nevertheless, the council, without previous notice of any kind, purported, on 5th June, 1905, to read the by-law a third time and pass it.

Gladstone is a town of less than 1,000 inhabitants. In such a place inquirers can readily get information, and it seems hard to believe that any one, wishing to know the terms of the by-law, would have had any difficulty in getting access

to the original. In such a town, council meeting dates get well known and can readily be ascertained. It is difficult, therefore, to believe that in this case the omission to publish a notice shewing where the by-law could be seen, can have influenced any voters, or that the lack of the formal adjournment of the further consideration of the by-law, and the not stating or publishing the time when such further consideration would be again taken up, really prevented any one from knowing that it was to be taken up on 5th June. But that is not for me to decide.

The principle on which a Judge must act in such an application as this, is stated by Chief Justice Harrison in Mace v. Frontenac, 42 U. C. R. at p. 85, and quoted and approved of by Killam, J., in Hall v. South Norfolk, 8 Man. L. R. 438. In Mace v. Frontenac the question was as to the validity of a by-law passed under the provisions of an Act of a similar purport to the one now in question. After referring to the evils of the excessive use of intoxicating liquors, that learned Chief Justice says: "An Act which has for its purpose the repression of these evils has a good purpose . . . but the Act, notwithstanding the goodness of its purpose, is a most serious infringement on the natural liberty of the subject. . . . It is, therefore, the duty of the Court, when its power is invoked to quash such a by-law . . . to ascertain whether the by-law moved against has really been so passed as to be a valid by-law, and if not so passed to declare it invalid."

In Hall v. South Norfolk objection was taken to the by-law, that one necessary publication of the notice of time of voting had been omitted, and that, though the day and place of the further consideration of the by-law after the voting had been stated in the notice, the hour of the day for such consideration was not named. In his judgment the learned Judge points out that the majority of votes in favour of the by-law was so great that it could hardly be imagined that the omission of one publication of the notice could have affected the result, and also states that there was no evidence that any person desiring to object to the third reading was deprived of the opportunity, owing to the notice omitting to state the hour of the day at which the further consideration would be had. Nevertheless he held that he was obliged to quash the by-law, giving as his reasons the following:—"But it would be exceed-

ingly difficult for any person to shew very clearly the effect of want of compliance with such provisions, and much more difficult for a Court to determine the point at which defects become important. The only safe course is to act on the supposition that the legislature meant what it said when it prescribed the method of procedure, and to hold the by-law invalid if the method has not been followed."

It is true that in some applications Courts have held that certain irregularities did not justify the quashing of by-laws. But, in a case like the present, where a motion to quash is the only method of testing a by-law's validity, a strict rule prevails. I cannot, in any case, accept the view that the omission of a specific requisite of the statute can be treated as a mere irregularity.

The provision of sec. 66, that the notice shall state that "the proposed by-law or a true copy thereof can be seen on file until the day of taking the vote at the office of the clerk of the municipality," stands out clearly as a distinct and separate statutory requirement. Its object, apparently, is to enable interested parties to see the provisions of the proposed by-law, so that they may be in a position to intelligently take such action as to it as they may think proper. If the published notice, while not using the language of the Act, had yet been so worded as to reasonably cover the ground and to intimate that the by-law was open to inspection at the clerk's office, I should deem it my duty to try to find that there had been a sufficient compliance with the statute in that respect. But, as all reference to this requirement of the section was omitted, I must either hold such omission to be fatal, or decide that the legislature, though enacting it as a specific requirement, yet meant to allow the council to treat it as not requisite. In view of the plain wording of the section, I can only hold that the legislature meant what it said, and find that the omission vitiates the by-law.

A third reading of such a by-law is not an empty formality. Though it cannot take place till the assent of the voters has been had, that assent is nothing more than a giving of permission to finally enact the by-law. When the time for the third reading comes, the councillors must still exercise their own judgment as municipal representatives, and decide whether or not to pass the by-law. Till it is finally passed its opponents have the right to openly oppose it, notwithstanding the taking of the votes of

the electors. The time of its coming up for the third reading is their last chance, and we know that it is seldom a very hopeful one at that stage of the proceedings. But they have the right, for what it is worth, to make that last effort.

The statute, by its provisions as to notice of the time for further consideration, recognizes that right, and also recognizes the concomitant right to receive previous notice of the time when such further consideration will be had.

The omission on 1st May to adjourn such consideration to a fixed time in the future, and the omission to give notice that such further consideration would be had on 5th June, in effect deprived opponents of the by-law of those rights. They must be assumed to have had no means of knowing when the third reading would be taken up, and consequently must be presumed to have been unable through ignorance of the time of such third reading to attend and make their final protest.

It may be, and probably is, the fact that all interested parties really knew in advance of the intention to have the third reading on 5th June. But, in face of the requirements of the statute, I cannot assume that they so knew, or, even that if they did know, those requirements could be treated as immaterial.

There will be judgment that the by-law be quashed.

If I felt that I had a discretion in the matter I would refuse costs to the applicant. He has not shewn that he personally was misled, or suffered any deprivation, as a result of the omissions which I hold fatal to the by-law. On the other hand, the evidence of Mr. Schooley, the town clerk, impressed me with the belief that such omissions were unintentional and that the municipal authorities tried to do their duty.

But the wording of sec. 427 of the Municipal Act is that the Judge "may quash the by-law in whole or in part, for illegality, and, according to the result of the application, award costs for against the corporation."

As the result of my finding is to quash the entire by-law for illegality, it seems to me that the wording of the above section makes it compulsory on me to award costs according to that result.

The order, therefore, must provide that the town pay Cross's costs of the application forthwith after taxation.

BRITISH COLUMBIA.

(VICTORIA.)

MARTIN, J. JULY 31ST, 1905.

COURT.

RE BAKER AND SMART.

Mines and Minerals—Coal Mines Act—Prospecting Licenses —Leases—Powers of Chief Commissioner—Issue of More than one License for same Area — Dispute as to Right— Jurisdiction of County Court—Crown—Lieutenant-Governor in Council—Construction of Statutes — Grouping Petitions.

Application by Smart to make absolute an order nisi for prohibition to a County Court to prohibit it from assuming jurisdiction under sec. 9 of the Coal Mines Act, R. S. B. C. 1897 ch. 137.

R. T. Elliott, for Smart.

Sir C. H. Tupper, K.C., for Baker et al.

MARTIN, J.:—This application differs from that of Leckie et al., in which I delivered judgment on 3rd June last, in that all the parties concerned already hold prospecting licenses under the Coal Mines Act for the same area of land. At the outset it is to be remarked that though Baker, and the 5 other petitioners, whose petitions are identical with his, allege that 5 other license holders mentioned in pars. 3 and 8, including the present applicant, Smart, are applying for leases, yet it is not alleged that Baker et al. are doing so, or are in a position to do so. The petitioners ask that the opposing licenses be declared void, and no leases granted thereunder, because of the non-observance of statutory formalities; and that their own licenses be declared to be prior to the others.

It seems necessary, I think, for a proper understanding of the subject, to decide the question raised as to whether or no the Chief Commissioner is given power by the statute to issue more than one license for the same area. After a careful consideration, I am of the opinion that he does not possess that power, and that the intention and effect of the Act is that a license shall confer upon the holder thereof the exclusive right, for the purposes of the Act, to the area covered thereby. This is shewn all through the relevant sections, but I particularly refer to the following expressions:—"Before entering into possession of the particular part of said coal lands he or they may wish to acquire and work for coal," followed by directions for location, in sec. 1; "the plot of land

over which the privilege is sought," in sec. 3; "piece of land sought to be acquired," and its dimensions, in sec. 4; "lands held under his license" and "covered by prospecting license," in sec. 5; the "new license over the same lands" to a new applicant, in sec. 6; the extension provided by sec. 7; and the right to "use the timber and stone on the land included in such license for the purpose of his mining operations and for the erection of buildings on said land," under sec. 8.

Though it is not suggested that any department of government can advance its powers beyond a statutory limitation (cf. Peck v. Regina (1884), 1 M. M. C. 13, and cases cited in the supplemental note thereon in 2 M. M. C. in "Additional Notes"), yet for the reasons set out in the "notice respecting coal and petroleum lands in South-East Kootenay," published in the British Columbia Gazette for 16th June, 1904, a special form of license was authorized, and issued on 3rd August, 1904, to many persons representing conflicting interests in the same area, which, it is stated by Sir Charles Tupper, the petitioners' counsel, has led to the present difficulty, and he consequently contends that "a dispute as to the right or title to a prospecting license" has arisen under sec. 9, which it is the duty of the County Court to determine summarily as thereby directed.

The situation so created as above is undoubtedly unforeseen, and could not have been contemplated by the framers of the statute, because on the principle that "the King can do no wrong" (Broom's Legal Maxims, p. 52), it must have been presumed that the powers of the Crown would not be exceeded: nevertheless, if the language of the statute is wide enough, effect will have to be given to it.

The objection is taken that no relief can be granted the petitioners which does not in effect involve the granting of an appeal to the County Court from the action of the Chief Commissioner under sec. 3, or the Lieutenant-Governor in council under sec. 5; and further that, because the Crown is not named in sec. 9, it cannot extend to it, but should be restricted to disputes between subjects.

Many cases were cited on both sides, but I find I am unable to derive much assistance from them because of the special provisions of this statute, and the peculiar and different proceedings under secs. 3 and 5 that sec. 9 must be considered in relation to.

There is here a "dispute" between conflicting license holders for the same area, and such being the case, at first blush I might be disposed to hold that sec. 9 has application, even though the Crown is not directly mentioned, on the principle

that having regard to the other sections it might be held to be included by implication. But a more careful consideration of the whole statute satisfies me that this cannot be, because both secs. 3 and 5 presuppose that there is only one license for each area, and therefore the granting of the lease under sec. 5 is something which depends solely upon the question as to whether or no said exclusive licensee "produces satisfactory evidence" of his discovery to the Lieutenant-Governor in council, who alone determines the sufficiency thereof. It would be, in my opinion, as impossible to substitute the County Court for the Lieutenant-Governor in council, under this section, as for the Chief Commissioner under sec. 5, which I have already decided cannot be done. If that is not so, then the licensee, in case of being dissatisfied with the way in which the Lieutenant-Governor in council had rejected his proffered proofs, might, though no one else was concerned except the Crown and himself, appeal from the council by invoking the assistance of the County Court to get his lease, on the ground that there was a "dispute" or "claim" under sec. 9; and not only this, but also after the lease was granted he could compel the Crown to sell the lands to him at the end of 5 years—in short completely oust the council and the Chief Commissioner as well, and wipe out all the exclusive or discretionary powers clearly conferred upon them by the various provisoes (a), (c), and (d) of sec. 5. And the same remarks apply to the subsequent proceedings under sec. 7.

While it is difficult, from the looseness of the language, and also unnecessary, to endeavour to say exactly what disputes or claims sec. 9 can apply to, yet, on the other hand, it is not difficult to suggest some it may relate to, e.g., questions of boundary, of title as in the case of other lands, and of rights under sec. 8. But it is clear to me that, after giving due effect to the peculiar provisions of secs. 3 and 5, it has no relation to the special proceedings there authorized, and though the unforeseen issue of conflicting licenses has brought about unexpected disputes, yet that does not alter the principle of statutory construction which I have already applied to the case of sec. 3 as hereinbefore stated. On the subject of attacking Crown leases generally I refer to Canadian Co. v. Grouse Creek Flume Co. Ltd. (1867), 1 M. M. C. 3; Hartley v. Matson (1902), 2 M. M. C. 23; and St. Laurent v. Mercier (1903), 2 M. M. C. 46.

As to the formal objection raised to the grouping of the petitions, it is only necessary to say, in the circumstances,

and having regard to the form of the order of the County Court made at the request of the petitioners, which directly compelled this application to be made, that I am unable to give effect to it.

The result is, therefore, that the County Court has, on the face of the petitions, no jurisdiction in the premises, and the order nisi must be made absolute.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. JULY 27TH, 1905.

TRIAL.

SWILLING v. ARNOLD.

SWILLING v. GLASS.

Sale of Goods—Warranty—Breach—Soundness of Animals —Damages—Promissory Notes for Price — Action on— Counterclaim—Set-off—Costs.

Action upon two promissory notes, one made by Arnold, Speers, and Glass in favour of plaintiff, and the other made by Glass and Arnold in favour of plaintiff.

J. A. M. Patrick, Yorkton, and W. R. Parsons, Yorkton, for plaintiff.

E. L. Elwood, Moosomin, for defendants.

WETMORE, J.:—Defendants Glass and Arnold purchased from Swilling a number of horses at 2 separate, or 3 separate, sales. The first sale was on 28th September, 1903, and the second sale was in November of the same year, and what I may call the third sale followed very shortly after that, in November also; there was only a day or two between the second and the third sale. The second sale was of a number of colts (yearlings) and the third sale was of horses purchased at an auction. Upon being sued upon the notes given for the price of the horses, defendants Arnold and Glass counterclaimed, alleging practically that plaintiff when he sold these horses warranted them to be sound, and they brought separate counterclaims; that is, in respect to the action brought by Swilling against Arnold, Speers, and Glass, they counterclaimed for a breach of warranty of the horses sold on 28th September, and in the action brought against Glass and Arnold they conterclaimed with respect to the warranty of the horses sold in November. I see no reason why there should not have been one counterclaim, unless it was in the

mind of the advocate when he counterclaimed in each action to have something in each action to set off against the notes respectively sued on, but the result of bringing the counterclaim in this way has been to complicate matters in a manner that I will explain hereafter. Now, I find that there was a warranty, on each sale, of soundness. I find that these horses that were sold had the seeds of mange in them. I do not mean to say that every solitary horse was mangy, but I do mean to say that each band at the time of sale was more or less afflicted with mange, and I hold under the evidence that mange is an unsoundness, and that these horses having been afflicted in this way there was a breach of the warranty. Now comes the difficulty that I have had to experience in view of the way the action has been shaped. How many horses were diseased in the first band and communicated the disease to other horses? Because, when these horses were bought, the disease developed and it broke out in other horses, either they had the mange in them when they were bought, or the mange, which is an infectious disease, was communicated to the other horses that had not any mange about them at the time of the sale. In fact the disease was communicated to some horses belonging to Arnold that were not included in the purchase at all. And the difficulty I have found in awarding damages is just to determine what has been the effect of each warranty—how far the horses of the sale of 28th September communicated the disease, and how many of them were diseased at the time of the sale, or how many of the horses of the November sale were diseased at the time of the sale, and how far they communicated the disease. In fact under the evidence it is utterly impossible to do it. There has been no separation among the horses at all. As a matter of fact the horses of the September sale were taken out to Speers's place in the first instance, kept there for some weeks, and then after the sale of the second lot they were taken back to Arnold's, and they were all ranged together. Then they were brought back to Speers's place, and some 27 head were cut out and put in Speers's stable, and the balance of 60 head were turned to range east on the prairie. Now, of these 27 head that were put in Speers's stable some were horses of the sale of 28th September, and some of the other sales, and in the same way, some of the horses that were turned loose to range east were of one sale, and some the other. I found it utterly impossible to make any distinct findings with respect to each separate warranty. All I can do is to find out what the loss

was to these two defendants by reason of the breach of this warranty, to figure out the amount of that loss and divide the damages which I have arrived at, apportioning one part of it to the one case and the other part to the other. I have just divided it in two. At present I just wish to say that I found another difficulty in getting at what I should allow as damages. Everything so far as the evidence went affecting the damages was of a most general character. These horses were purchased at different prices, all except those horses that were purchased at the first sale; they were purchased, I think the evidence states, at $60 a piece, except some colts that were sold to Simpson, and they are out of the question, because they were sold, and they got the benefit of them; they do not enter into this question at all. But the other horses were bought at various prices, as, for instance, the yearlings $25 a head, and the horses bought at the sale were purchased at $17 and upwards. Now, there I am left. How in the world am I going to get at the figures with respect to these horses in this way? Then, when they were found dead here and there, in no one case do they state: "There, that was a horse I paid $60 for." "That was a horse I paid $17 for." "That was a horse I paid $25 for." No evidence of that character has been given at all. And, as I said before, these horses were all mixed up together, and there is not a particle of evidence to shew to which band any one individual horse belonged, or what price was paid for any one individual horse; and apparently defendants expect me on such general testimony to give them everything at the highest price that was lost. At a matter of fact I cannot do that, and I have had to jump at it. I may say that I do not know that I am proceeding in a manner authorized by law in jumping at what I have, or apportioning the damages resulting from the two breaches of warranty in the manner I have done. It is the only way, however, I can see out of the difficulty. There is another element that enters into this case; that is, that while I am of opinion and find that a large number of these horses, in fact all of them that I have found dead, died of mange, I am of opinion and find that the deaths were to a large extent contributed to by defendants themselves. In my opinion, they did not take just as good care of these horses as they might have done. I think the horses that were brought into Speers's barn were taken care of from the time they were brought there, as much care as could be taken of them, but that did not happen until the first week in January, and in the meanwhile these animals had been running about, I think in the first place in view of the number of horses, in a very

limited range. They were running about in about a section of land, part of the time out in the daytime—part of the time out on the prairie and part of the time in the field. Later they were put in a field and kept in a field; I think therefore the range was limited, and in the next place I think the place they were put in was too exposed. I can quite understand horses running out in this country all winter if they have some place of shelter, but here was a place where there was practically no shelter at all; that it was exposed the evidence clearly establishes; and these horses had no place to shelter themselves from the wind unless they got behind some old stack that was there, or some little scrub. From the first week in November until the middle of January they were diseased and no care was taken of them, when they were taken out in January to range east. If they had been sent there before, I am satisfied as much loss would not have happened as did happen, and therefore I am going to dock the defendants, and not allow as much damages as I otherwise would have. I think that at least 25 per cent. of the loss that occurred was due to their having not properly cared for the horses in the respect that I speak of. Then, again, after the horses were getting scabby and 10 or 15 dead, they took no steps to ascertain what the trouble was, and they did not call a veterinary surgeon down there until some time in March, when they were bringing them in in the spring. I think there they were very lax. They did not act as prudent men would have done in that respect. There were some horses belonging to Arnold that died outside of these bunches purchased from Swilling. These horses of his all got the mange, and 9 of them died, and these were valuable horses, worth $100 a piece, as stated in the evidence. I will allow nothing with respect to damage done to those horses by the mange. Up to a certain time they had been kept altogether free from these horses, and they could have just as well been kept free from them afterwards as they had been before, but, after this disease had developed, they deliberately put them where they would come in contact with the mangey horses. It was claimed they did not know it was mange, but that does not help the matter. They did know the horses were sick, they were developing this scabby appearance, and I think any prudent man before he turned his expensive horses in among this bunch ought to have taken means, or made an attempt at least, to find out what this disease was. After this thing had broken out and become quite noticeable, they deliberately turned these well horses in among the mangey horses, and it seems to me, so far as the men are concerned,

it just served them right that their own horses got it, although I am very sorry for the poor animals that had to suffer, as it was no fault of theirs; and I will not give defendants any damages with respect to those horses.

Now, the horses that died: In the first place there were 27 head that were put in Speers's stable about 1st January, and they all died but one; that we have established clearly. There were also 10 head that died in Speers's field before these horses were put in the stable, and there were 5 more that died in Arnold's field before they were put in the stable. These horses were put in the Speers stable, and a bunch turned east to range at the same time; there were some 60 sent out in the bunch to range east, and the evidence with respect to how many of those died is not very satisfactory. Some of the horses had been sold before they were turned out, and there were 10 brought back out of this bunch of 60 that were turned out east, and only 6 of them lived; otherwise, 4 of them died. Mr. Arnold has sworn that there were some 30 or 40, or so, of skeletons that he counted on the prairie. However, when he is pressed on cross-examination in the other Swilling case, he will not swear to any fixed number at all, and if he will not I will not. Taking the evidence of Hayes and one of the Harts, another witness, I have come to the conclusion, as near as I can under the evidence, that there were about 25 of those horses that were turned out east that time that died. It is true, they only brought 10 back, as I stated, but the horses might have been wandering away, and in this connection we have the evidence of Mr. de Ballenhardt that he went down to Dubuc and there found, I think, some 6 or 7 horses that had the Swilling marks on them, and then he went south of Broadview, south of the main line of the Canadian Pacific Railway, and found some horses there that had the same marks on. For all I know these may have been the same horses, they may have wandered down there, and we know how horses will wander when they are allowed to do so, on the prairie. So, therefore, I will fix this number at 25, and, then, again, there are the 4 horses that were brought back that died. I have fixed the price of these horses at $40 each, so the damages that I have arrived at are the

26 head that died in Speers's stable	$1,040
10 head that died in Speers's field	400
5 head that died in Arnold's field	200
25 head of those turned out on the range east	1,000
4 head that were brought back from the range	160
Making	$2,800

From that I have deducted 25 per cent. on account of defendants' want of care in the matter, which is ..$ 700

That leaves a balance of $2,100
Then I have allowed him on loss of profit on re-sale.. 500
And feed, care, and attendance of those that died 200

Making in all $2,800

And I have applied $1,400 to the counterclaim in each case.

Therefore, in Swilling v. Arnold, Speers, and Glass, there will be judgment for plaintiff on the claim for $1,550.57, and costs. Then there will be judgment for defendants Arnold and Glass on their counterclaim for $1,400 and costs, including a counsel fee on trial of $75; there will be one taxation of costs, one judgment will be set off against the other, and the party in whose favour the balance may be after such set-off is to have execution therefor.

In Swilling v. Glass and Arnold there will be judgment for plaintiff on the claim for $2,434.70, with costs. There will be judgment for defendants on the counterclaim for $1,400 and costs, including a counsel fee on the trial of $25. There is to be one taxation of costs, one judgment to be set off against the other, and the party in whose favour the balance may be after such set-off is to have execution therefor.

NORTH-WEST TERRITORIES.

(SASKATCHEWAN.)

PRENDERGAST, J. JULY 28TH, 1905.

CHAMBERS.

REX v. BRIMACOMBE.

Criminal Law—Conviction—Notice of Appeal—Insufficiency —Time of Sitting of Court not Stated.

Appeal by defendants from a magistrate's conviction. The appellants were convicted on 8th April, 1905, by R. N. Blackburn, a justice of the peace, of having knowingly caused to be issued a license for the sale of intoxicating liquors contrary to the provisions of the Liquor License Ordinance, N.W.T. sec. 88, and were fined $250 each and costs.

The appellants entered an appeal, which was heard on 26th May, 1905, before PRENDERGAST, J., at Battleford.

J. McKay, K.C., for the informant, objected to the notice of appeal on the ground that it did not sufficiently comply with sec. 880 (a) of the Criminal Code, in that it did not state that appeal was being made to the next sittings of the Judge

in Battleford, but that the notice of appeal simply gave notice that the appellants would appeal to the Judge sitting at Battleford, without stating when.

T. H. McGuire, for the appellants.

The objection was reserved by the trial Judge for the opinion of the full Court, and a reference was made as follows: "Was the notice of appeal sufficient notwithstanding that it did not state that the appeal was being made to the next sittings of the Judge, or in any way stating when the appeal was to be heard?"

PRENDERGAST, J.:—This matter came before me at the sitting of the Court held at Battleford on 26th May last, as an appeal from a magistrate's conviction.

The preliminary objection was taken by Mr. McKay, K.C., of counsel for the informant, that the notice of appeal did not comply with the statute. It was suggested, however, that both parties having brought their witnesses from a considerable distance, and being otherwise ready to go on, the hearing might be proceeded with pending a decision of the full Court on a reference, which I intimated I would make on the point raised as above stated.

The evidence was then put in for both sides and counsel heard, and I reserved my decision.

On a reference subsequently submitted by me to the Court in banc, the said Court sitting at Calgary on the 14th instant decided that the said notice of appeal does not comply with the statute and is insufficient. I consequently find that this appeal was improperly brought before me, in fact that there is no appeal.

The proceedings purporting to be in appeal from the said conviction are hereby dismissed with costs to the informant.

MANITOBA.

RICHARDS, J. JULY 25TH, 1905.

TRIAL.

VAIR v. UNITED FRUIT AND PRODUCE CO.

Sale of Goods—Acceptance—Action for Price — Deduction for Inferior Quality—Costs.

Plaintiffs agreed to sell to defendants 1,000 barrels of XXX apples to be delivered on board cars in Ontario at $2 per barrel. They delivered 1,068 barrels. They also sold

and delivered to defendants some honey, the price of which was $110.80. Plaintiffs were obliged to pay $560.82 for freight charged from the place of shipment to Winnipeg on some of the apples. By the contract defendants were liable for the freight. Defendants paid plaintiffs $1,825.92 on account.

There were only two questions involved which needed consideration: 1st, whether defendants accepted, or, if not, were justified in refusing to accept, a portion of the fruit, which portion they alleged that they did not accept. 2nd, Whether the fruit was of XXX grade, or, if not, what the value was of such of it as was not of that grade, though accepted.

H. M. Howell, K.C., and T. G. Mathers, for plaintiffs.

C. P. Wilson and D. W. McKerchar, for defendants.

RICHARDS, J.:—I am of opinion that defendants did accept all of the apples. Defendants say they only stored a part of them for the railway company that had transported them to Winnipeg. But they sold for their own benefit, and kept the proceeds of some, at least, of the carload in question.

The evidence, I think, shews that about one-fourth of the apples were of XXX quality, and the others of varying lower grades.

The actual percentage of the different lower grades, and the values to be allowed for them, can only be approximated.

The best conclusion that I can form is to treat one-fourth, or 267 barrels, as up to contract, and to allow $1.50 per barrel for one-half, or 534 barrels, and $1 per barrel for the remaining 267 barrels. On that finding the amount that plaintiffs were entitled to, is made up as follows:—

267 barrels at $2 per barrel	$534 00
534 barrels at $1.50 per barrel	801 00
267 barrels at $1 per barrel	267 00
Freight charges paid by plaintiffs	560 82
Value of honey	110 80
	$2,273 62
Deduct payments made	1,825 92
Balance due plaintiffs	$ 447 70

The counterclaim was not satisfactorily proved and will be disallowed. There will therefore be judgment for plaintiffs for $447.70.

The question of costs presents several difficulties. Plaintiffs delivered fruit, the bulk of which they ought to have known, and probably did know, not to be of the grade contracted for. Their so doing caused defendants much trouble, by forcing them, on the arrival of the fruit, to at once decide whether to accept it or not. Buyers at this great distance from fruit producing countries are obliged to rely to an unusual extent on the honesty of those they buy from. They have retail customers whom they have to supply, and whose continuance as their customers may depend not only on their being able to supply them, but on their being able to supply a good quality of fruit. When goods reach here in the fall and are inspected, if they are found to be below the grade contracted for, it is often too late to order other goods of the right quality, and the buyers are obliged to make the best they can of what has been sent them, or have nothing on hand to supply to their customers. While I do not suggest that fact as influencing the present plaintiffs to deliberately ship goods inferior to those agreed for, there is no doubt that it may influence unscrupulous packers to do so, and give them an undue advantage.

If the above were all that I had to consider, I should refuse costs to plaintiffs. But the defence called a large number of superfluous and unnecessary witneses. Much time was unnecessarily lost at the trial owing to witnesses not having been interviewed and their evidence ascertained and briefed, in advance of their being put in the box. If that had been done and the number of witnesses kept within reasonable bounds, the case would have taken much less time to try. The delay, so caused, made it impossible to finish the case at the sitting at which it came on for trial. As a result, the plaintiffs, who live in Ontario, were put to much otherwise unnecessary delay, expense, and inconvenience. For those causes I have decided to allow plaintiffs their costs. But, as the cross-examinations of defendants' witnesses were unnecessarily long, one-fourth is to be deducted from the counsel fees at the trial, after their taxation in the usual manner.

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BRITISH COLUMBIA.

(ROSSLAND.)

MARTIN, J. JULY 1ST, 1905.

TRIAL.

BANK OF MONTREAL v. HARTMAN.

Interest—Bank Act — Bank Stipulating for Usurious Rate— Reduction to Maximum Rate.

Action to recover $5,337.35, principal and interest due upon certain promissory notes discounted by defendant with plaintiffs.

The notes bore interest at the rate of 12 per cent., "as well after as before maturity."

As to the interest defendant pleaded the Bank Act, sec. 80.

When the action came on for trial, judgment was confessed for the principal, and the question of the quantum of interest was argued.

A. C. Galt, for defendant, contended that, as the claim for 12 per cent. interest was in excess of the rate allowed by the Bank Act, the contract for interest was "nudum pactum," and the Court, in awarding interest by way of damages, could only allow the legal rate of 5 per cent.

W. J. Nelson, for plaintiffs, contended that under secs. 80 and 81 of the Bank Act (which must be read together) an usurious contract as to interest no longer subjected a bank to

penalty and forfeiture; that the contract as to interest was only invalid in so far as it stipulated for more than 7 per cent., the maximum rate allowed by the Act; that the bank were entitled to 7 per cent. under these sections, and such rate of interest should be allowed.

Galt replied, citing Banque de St. Hyacinthe v. Sarrazin (1892), Q. R. 2 S. C. 96; Maclaren on Banks and Banking, p. 165.

MARTIN, J.:—It is contended by counsel for defendant that because the bank has, contrary to the provisions of sec. 80 of the Bank Act, stipulated for and taken on the defendant's promissory notes a prohibited rate of interest, 12 per cent., the contract is illegal and void, and there being then no contract of any kind for interest between the parties, the Court will not make one for them, and all that the bank can recover is that rate authorized by the general law of interest, viz., 5 per cent.

It was held by Mr. Justice Pagnuelo in Banque de St. Hyacinthe v. Sarrazin, Q. R. 2 S. C. 96, that the same section in the Revised Statutes, ch. 120, sec. 61, was a matter of public order, and it is argued that a contract entered into contrary to public policy is necessarily null and void; citing Bank of Toronto v. Perkins, 8 S. C. R. 603, 610, 616; and Dunn v. Malone, 6 O. L. R. 484.

But however that may be as a rule, the statute here is peculiar, for the next section, 81, of the Bank Act declares that:

"No promissory note, bill of exchange, or other negotiable security, discounted by or indorsed or otherwise assigned to the bank, shall be held to be void as regards such bank or any maker, etc. . . . by reason of any rate of interest taken, stipulated, or received by such bank; but no party thereto other than the bank shall be entitled to recover or liable to pay more than the lawful rate of interest in the province where the suit is brought, nor shall the bank be entitled to recover a higher rate than 7 per cent. per annum."

Reading these two sections together, as they must be read, it would be impossible to hold the contract void; the intention is clearly that it shall be invalid only in so far as it stipulates for more than 7 per cent.

Judgment will therefore be entered for the plaintiffs with costs, with interest calculated at that rate.

BRITISH COLUMBIA.

(VICTORIA.)

DUFF, J. AUGUST 4TH, 1905.

COURT.

CAPITAL CITY CANNING AND PACKING CO. v. ANGLO-BRITISH COLUMBIA PACKING CO.

Fisheries — British Columbia Foreshore Lease — Powers of Chief Commissioner of Lands and Works—Non-exclusive Right—Injunction.

Motion by plaintiffs for an interim injunction.

Plaintiffs' claim, as indorsed on the writ of summons, was for a declaration that they were entitled to a sole and exclusive salmon fishery and right to take salmon in traps in and upon a certain tract of land (described) in the district of Renfrew, demised by a foreshore lease, together with the territorial waters of the province of British Columbia appurtenant to the described tract; also for $50,000 damages, for defendants' wrongful acts in breaking and entering plaintiffs' sole and exclusive fishery and taking fish; for a declaration that all salmon caught and taken by defendants in their fish trap erected in plaintiffs' sole and exclusive fishery were the property of plaintiffs, and that plaintiffs were entitled to a return thereof or payment of the value; for an account; and for a mandatory injunction requiring defendants to pull down and take away and remove their fish traps and all appliances, etc.

Upon the argument of the injunction motion it appeared that the British Columbia Fisheries Act had never been proclaimed, and that, although the Land Act, under which leases are granted, provides that they shall be granted by the Lieutenant-Governor in council, they are in fact granted by the Chief Commissioner of Lands and Works, following the procedure of the Land Act previous to the amendment of 1899.

R. T. Elliott, for plaintiffs.

E. P. Davis, K.C., and Luxton, K.C., for defendants.

DUFF, J.:—Mr. Elliott was unable to refer me to any authority, statutory or otherwise, vested in the Chief Commissioner of Lands and Works empowering him to grant, in the name of the Crown, a lease or other exclusive right of occupation of the bed of the sea below low water mark—and I think there is no such authority.

The grant relied upon, therefore, must be read as creating a non-exclusive license only. Such a license has this limited operation—it makes that lawful which otherwise would be a trespass on the proprietary rights of the province, but confers no interest in any part of the soil except those parts actually occupied pursuant to it.

It was not seriously argued that on this view of the construction and effect of plaintiffs' grant, the application for an injunction could be supported.

On the construction of the grant I refer to Duke of Sutherland v. Heathcote, [1892] 1 Ch. 475, and Centre Star Mining Co. v. City of Rossland, 9 B. C. R. 403, and particularly to the judgment of the Chief Justice in the last mentioned case on pp. 405-6-7.

In this view it is unnecessary to refer to the other interesting questions discussed by Mr. Elliott in his able argument.

The following judgment was afterwards given:—

DUFF, J.:—The plaintiff's ability to establish either an exclusive fishery in the waters in which the defendant is fishing or an exclusive right to maintain salmon traps on the situs where the erection complained of is placed, is a condition of its success on this application: Duke of Sutherland v. Heathcote, [1892] 1 Ch. 475. Exclusive fishery there is plainly none, and the alternative claim fails also in my opinion.

This claim is based upon a grant made by the Chief Commissioner of Lands and Works, in the name of the Crown, which contains the following language material here: "His Majesty, under and by virtue of all powers Him thereunto enabling, doth hereby demise unto the said J. E. Kinsman, his creditors, administrators, and assigns, all the estate, right, title, and interest of His Majesty the King, in the

right of the Province of British Columbia, in and to that piece of land situate, lying and being in Renfrew district, and being composed of that part of the foreshore and tidal land fronting on section 79, Straits of Juan de Fuca, which said foreshore follows the sinuosities of the coast, and which is marked at each end by a post numbered —, which demised premises are more particularly indicated on the plan hereto annexed and thereon coloured red, together with such rights to take salmon in traps in the territorial waters appurtenant thereto as may be vested in His Majesty in the right of the Province of British Columbia as aforesaid."

I will assume that this language (to use a theologian's phrase), is patient of a construction supporting the plaintiff's claim to an exclusive license to erect fish traps within an area embracing the site of the defendant's trap. I conceive that it is at least as easily read as granting a non-exclusive license only. As an ambiguous grant from the Crown, therefore, it should be construed in the sense least favourable to the grantee, unless the relevant circumstances are coercive against such a construction. The circumstances here favour the narrow rather than the liberal construction.

Further, the construction proposed by the plaintiff is, I think, to be rejected on the ground that no authority is vested in the Chief Commissioner of Lands and Works empowering him to grant for the purposes of trap fishing any exclusive right of occupation or user of the bed of the sea below low water mark. It is not disputed that the source of this authority must be found (if it exist) in some legislative enactment; but it is contended that the legislature has in sec. 41 of the Land Act (as amended in 1901) conferred upon the Chief Commissioner of Lands and Works the power to dispose for such purposes of that part of the public domain.

The section in question is as follows:—

"41 (1) Leases (containing such covenants and conditions as may be thought advisable) of Crown lands may be granted by the Chief Commissioner of Lands and Works for the following purposes:—

(a) For the purpose of cutting hay thereon for a term of not exceeding ten years;

(b) For any purpose whatsoever, except cutting hay as aforesaid, for a term not exceeding twenty-one years."

Read alone, apart from the general body of legislation affecting the public lands, this section seems to confer powers ranging over every part of the territorial possessions of the province; and moreover, it places no restriction upon the Chief Commissioner of Lands and Works respecting the conditions to be exacted from lessees, either as to the terms of holding, or the mode of user of the subjects of the leases granted under it.

But it is not to be supposed that effect is given to the legislative purpose by treating this section as displacing the elaborate statutory provisions specially relating to the acquisition of title to coal, timber, and the base metals; and for a similar reason I think one should not conclude that when enacting this section the legislature was addressing itself to the subject of fisheries. In 1901, in the same session in which this section I am now discussing was enacted, the legislature passed an Act (the "British Columbia Fisheries Act, 1901"), dealing fully with the subject of the fisheries, and authorizing the Lieutenant-Governor in council to establish a Board of Fishery Commissioners, with power to grant leases for fishing purposes of Crown lands covered by water. That Act, it is true, provided that it should come into force only after proclamation to that effect by the Lieutenant-Governor in council. But such a proclamation could not affect the construction of sec. 41 of the Land Act. Nor if that section confers on the Chief Commissioner of Lands and Works the authority here contended for, could such a proclamation deprive him of that authority. I do not think it was the intention of the legislature that such power should co-exist with the special powers conferred by the British Columbia Fisheries Act, 1901, on the Board of Fishery Commissioners.

Moreover, in my opinion, the bed of the sea below low water mark is not within the scope of the Land Act. Not only its general tenor, but many special provisions of the Act also support this view. These I do not discuss in detail because I think that the definition of Crown lands furnished by the interpretation clause is conclusive.

By that clause it is enacted that "Crown lands shall mean all lands of this province held by the Crown without incumbrance." The site of the defendant's trap is not in my opinion within this definition. It was not disputed, and I

assume for the purpose of this application, that this site is intra fauces terræ. The bed of the sea in such places is part of the territorial possessions of the Crown; and being, except in the case of public harbours, within the disposition of the provincial legislature, is comprehended within the terms of the description "lands of this province held by the Crown." But this ownership of the soil is subject to the servitudes arising from the public rights of navigation and fishing and the rights concomitant with and subsidiary to them, and I apprehend that property held under a title so weighted cannot (in the ordinary meaning of the words or within any signification fairly to be imputed to them as they stand in the clause I am discussing) be said to fall within the qualification expressed by the phrase "held without incumbrance."

For my present purpose it is sufficient to consider the public right of navigation. "The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right:" Gann v. Free Fishers of Whitstable (1865), 11 H. L. Cas. 192, at pp. 207-8, per Lord Westbury.

The public right is subject to the control of the Parliament of Canada only. It constitutes a burden on the title of the Crown or the Crown's grantee of the fundamentum maris, which it is not in the power of the Crown itself or of the legislature of the province to remove or lessen. It is, therefore, in my judgment an incumbrance on that title, and it follows that the locus in question in this action is not subject to disposition under the Land Act.

BRITISH COLUMBIA.

(VICTORIA.)

MARTIN, J. AUGUST 5TH, 1905.

TRIAL.

GREENBURG v. LENZ.

Bill of Sale—Invalidity—Transfer of Goods in the Ordinary Course of Business—Sale of Stock en Bloc—Application of Bills of Sale Act.

Action for conversion of a stock of goods bought by the plaintiff from one Folz.

A. H. MacNeill, K.C., for plaintiff.

C. R. Hamilton, K.C., for defendants.

MARTIN, J.:—The defence to this action on the facts was that it was a fraudulent transaction and part of a scheme concocted by Folz to defraud certain wholesale houses, and to which plaintiff was a party. The jury, however, found that it was a bona fide transaction, and that plaintiff gave full value for the stock: the sale was followed by continuous possession, which was given immediately after the signing of the bill of sale. The defendants' counsel contends that said bill of sale is void, for reasons stated, and that since it is so plaintiff cannot succeed, because once a bill of sale has been given the plaintiff must rely on the written document and cannot fall back on possession as a distinct defence: Ex p. Parsons, 16 Q. B. D. 532; Newlove v. Shrewsbury, 21 Q. B. D. 41; and Phipson on Evidence, 3rd ed., p. 508. In answer to this plaintiff relies upon the verbal bargain followed by possession and cites Matheson v. Pollock, 3 B. C. R. 74; Brackman v. McLaughlin, ib. 265: he furthermore takes the ground that the transaction in any event is not within the Bills of Sale Act, because it is excluded by sec. 2 thereof, which says that said Act "shall not include . . . transfers of goods in the ordinary course of business of any trade or calling . . ."

This latter point must be decided first, before taking up, if necessary, Mr. Hamilton's argument, on the effect on third parties of the amendment of 1904, ch. 8.

The point turns upon the meaning of the words "ordinary course of business," and while Mr. Hamilton admitted that they would extend to something more than sales over the counter, he contended that sales by wholesale in the ordinary way would be a reasonable limitation, and that to sell off the whole stock could not be in the ordinary course of any business. On the other hand Mr. MacNeill took the ground that the words were wide in their application, and extended to all commercial transactions in the ordinary course of business dealings, one of which must necessarily be the disposal of a business en bloc, and that a narrow construction would defeat and hamper bona fide changes in and sales of businesses which in large centres especially were of everyday occurrence. In support of his contention he cited the decision of the learned Chancellor of Ontario in 1886 in Clarkson v. Rothwell, which is referred to in an article on "Mercantile Preferences" in the Canadian Law Times for March, 1891, at pp. 66-8, and in Parker on Frauds on Creditors (1903) at p. 122. That was a decision on the Ontario Act of 1885 "respecting assignments for the benefit of creditors," ch. 26, and the language in sec. 3 (1) was "nor to any bona fide sale or payment made in the ordinary course of trade or calling . . ." The learned Chancellor's view of the meaning of these words is as follows; (I quote from the copy of his judgment which has been obtained for my assistance):—

"Of course one may say that that means the ordinary dealing of buying and selling over the counter. I am not sure that it is confined to that limited meaning. It may have the larger meaning, Where you are going to deal with a transaction which will have the effect of preferring one of the creditors to the others, you may fairly say that it embraces such a transaction as this; because every one knows that in dealing with businesses the great desire is not to break them up and sell piecemeal, but to sell them en bloc. Therefore, in dealing with a business, the ordinary course of selling a business is to sell it en bloc. That was done in this case . . ."

Now it is true that the learned Judge was speaking of a statute the object of which was, as he says, "to destroy fraudulent preference," but at the same time he points out that there was no fraud in the matter, which "is the controlling thing after all," and he refused in the case before him to "upset a fair, straightforward, businesslike commercial transaction after it was closed." I do not see why this view

should not have a like application to our Bills of Sale Act. There is, of course, a difference in the language of the two sections, but it is, I think, merely one in the form of the words and not in their effect or substance. If anything, the expression "transfers of goods" would be wider than "any sale or payment made:" the word "transfer" imports, in commerce, something more, I think, than "sale;" and it is "any trade" and not merely "trade" as in Ontario. The transaction is, be it noted, not restricted to the "ordinary course of his (the debtor's business," and, in my opinion, the language relates to the general course of mercantile dealing, and cannot be given an effect in a small town where businesses change hands perhaps infrequently, different from that in a large town where it may happen many times a day. I do not see how a section dealing with the ordinary course of trade all over British Columbia could be construed in that limited and varying local sense. But in any event it is clear to me that where there is any doubt about the matter the Court should incline to uphold a bona fide transaction.

I hold therefore that the transaction is outside of the Act, and plaintiff is entitled to judgment with costs.

BRITISH COLUMBIA.

(NELSON.)

IRVING, J. AUGUST 8TH, 1905.

TRIAL.

WEST KOOTENAY POWER AND LIGHT CO. v. CITY OF NELSON.

Water and Watercourses—Dumping Rocks into River—Impeding Flow of Water—Rights of Lower Riparian Proprietors —Sensible Injury—Injunction.

Action to restrain defendants from dumping rock into the Kootenay river so as to injure and interfere with plaintiffs' works.

A. H. MacNeill, K.C., for plaintiffs.

E. V. Bodwell, K.C., and P. E. Wilson, for defendants.

IRVING, J.:—The plaintiffs are a power company, incorporated by ch. 63 of 1897, and own all the land on the north bank of that portion of the Kootenay river now under discussion.

By sec. 2 of ch. 77, B. C. stats. 1899, certain grants of water assigned to plaintiffs were confirmed to them, and they were given all the rights and privileges which they would have been entitled to if they had been incorporated under Part IV. of the Water Clauses Consolidation Act, 1897.

They have now in operation at the lower Bonnington Falls an hydro-electric power plant consisting of a canal 25 feet wide, 15 feet deep, and 600 feet long, leading from the Kootenay river above the Falls to a concrete dam situate below the Falls, through which dam are placed chutes for the purpose of conveying water to three turbine wheels by which the electricity, some 5,000 h.p., is at present being generated.

They are now constructing a more extensive hydro-electric power plant on the same side of the river at the upper Bonnington Falls. They are also owners of a power site on the south side of the river at the lower Bonnington Falls.

The defendants, the corporation of the city of Nelson, are constructing on the south side of the river, at the upper Bonnington Falls, some 3,000 feet above the plaintiffs' canal, an hydro-electric plant for the supply of electricity to the city of Nelson. The plan of their operations includes the excavation of 17,000 yards of rock. This rock, or rather so much of it as they do not require for building purposes, they propose to dispose of by dumping into the Kootenay river into a pool situate immediately below the upper Falls. Some of the rock will of necessity be thrown in the blasting operations into the river as well above as below the upper Falls.

The defendants' undertaking is authorized by an order in council (B. C. Gazette, 6th April, 1905, p. 634), made by the Lieutenant-Governor in council under the provisions of Part IV. of the Water Clauses Consolidation Act as amended in 1900, ch. 44. A slight alteration has been made in the plan by substituting vertical setting for the wheels in lieu of a horizontal setting as originally intended.

The plaintiffs allege that the dumping of rock will be injurious to them in some one of the following three ways: First, that the rock will dam up the river at a point (E) called

the Rapids, thereby reducing the head of water which they, the plaintiffs, would otherwise obtain at their new works at the upper Falls. Second, that at high water a large quantity of rock and sand will be carried down by the current to the plant at the lower Bonnington Falls, and will cause the canal there to be filled with rock and sand, and thereby injure the machinery and lessen the supply of water at that place; or the rock will lodge in the narrow channel, E, and that the supply of water at the lower Falls will be materially lessened. And third, that their power site on the south side of the river at the lower Falls will be damaged by the deposit there of rock and other material which will be brought down at high water.

The defendants' authority derived by order in council does not touch the question of the disposal of this rock; permission to throw their waste into the river is not given, nor is the order in council to be read as authorizing the work sanctioned, to be done negligently or in such a way as unnecessarily to cause damage to plaintiffs. The permission, however, does contemplate a substantial dealing with the bed of the river above the Falls, i.e., by constructing a canal to be formed partly in the river bed with a masonry retaining wall. That part of the work is not now in question. The complaint is limited to the disposition of the waste rock.

The contentions raised by plaintiffs depend to a great extent upon the transporting capacity of the river at high water with reference to rocks and waste material placed in it.

The plaintiffs say that in the years 1898 and 1899 little or no material was found in their canal, but that in the following years, when a railway contractor in making improvements on the line of railway caused large quantities of rock to be dumped into the river, the quantity of material found in their canal after each high water was very much increased. The figures after the high water of 1901 shew that they took out 1,000 yards; after 1902, 300 yards; after 1903, 2,000 yards; and after 1904, 2,200 yards; and now, after the high water of 1905,—I take it the high water is now over—something like two feet of detritus is to be found in their canal in front of their racks.

They called seven witnesses who deposed to the above, and, in the main, agreed with them that the dumping of rock would increase the tail water in the first pool and so spoil the

head of water for their new works at the upper Falls, or the rocks and other material would at high water go down the river and enter their canal at the lower Falls—and that some had already lodged in such a position as to injure their property on the south side of the river.

With reference to these annual accumulations in the canal the plaintiffs must remember that it is to be expected that a deposit of silt, sand, stones, and gravel will be made naturally by the river. What the extent is of this natural deposit they have not informed me. They refuse to say what proportion of the material found in the canal was large rock and what was not. I do not think that they were quite frank with me in that respect. I think the plaintiffs, perhaps unconsciously, are mistaken as to the amount of material actually taken out. Where the large piece of rock which was found in their canal came from I cannot say. It may have been a relic of the roughly finished work at the intake, or was never taken out, although I am quite prepared to believe that it rolled in from the bank. I am not satisfied that the banks and sides of the canal have been cleaned off as thoroughly as Mr. Campbell would have me believe. The great size of this rock would satisfy the ordinary labouring man, or even the conscientious foreman, that it could be safely left on the bank. Although I recognize the tremendous power of water, I can hardly believe that this huge piece of rock rolled down the bottom of the river from some point some distance above the intake, and mounted up over the precipice left by Gallagher, and so reached the canal.

The difficulty I have in dealing with the case is that so much is left to conjecture. No measurements of the depth of water in either of the pools below the Falls, or in the Rapids, have been taken. Nor have I evidence as to the direction of the sub-surface current. Nor have I definite evidence as to the rate of the current, during high water, below the first Falls, nor as to the character of the bottom of the river between the two Falls. These factors seem to me to be the most important in determining the transporting capacity of the river, and therefore the question whether or not there will be injury to the plaintiffs.

That a rapid stream such as the Kootenay is, will transport large quantities of silt, sand and gravel and shingle —and even pebbles—in suspension, and large stones, by roiling along the bed of the channel, cannot be disputed. The

rate of progress of any particular rock is quite uncertain—that would depend on its shape, weight, the character of the bottom, and the velocity of the stream. These four factors would themselves vary from time to time—as the shape becomes more rounded, the weight decreases as the rock becomes smaller, so the retarding forces diminish—but the tendency of the river to clear its course by shoving all material down stream remains constant. What will take place after a rock is thrown into the river is all surmise. What the effect will be of depositing this large quantity of rock on the bed of the stream there are no data to enable me to form a definite opinion.

The witnesses for the plaintiffs, as well as the witnesses for the defendant, were either employees of the parties to the action, or were expert witnesses, and in that way are liable to be biassed. The experts do not appear to have more bias than that which experience shews us always operates on the minds of professional or scientific persons when called upon to give expert evidence as to the matters relating to subjects in which they are skilled.

The evidence establishes that the defendants are throwing the rock and other material excavated on the bank of the river in such a way that the toe of the embankment will be under high water, and they intend unless restrained to deposit the bulk of the waste in the river bed in the pool just under the first Falls.

Their experts say that this embankment will remain there, that embankments always remain unless put on a sand bottom; that the rocks deposited in the pool will not be washed out. They are of opinion that if any rocks could by any possibility be washed out of the pool they would not lodge in the Rapids, but would be carried down. As they know nothing of the depth of the pool or of the nature of the bottom of the river between the two Falls, and as the velocity of the river below the Falls is admittedly 8 or 10 feet per second (that is three times the velocity required to move shingle), their evidence does not convince me that no injury will result to the plaintiffs.

On the contrary it seems clear that if they deposit this waste on the river bed as they propose, a certain amount of gravel, etc., is bound to be carried down, and it cannot be positively asserted that small pieces of rock will not go down.

If carried down, it is not possible to say that it will all pass clear of the plaintiffs' canal. The sudden drop which Gallagher says exists at the mouth of the canal will protect the canal to a certain extent, but what will happen in the course of time is impossible to conjecture.

In this state of uncertainty the question of onus of proof is of importance. In my opinion the onus is on the defendants. The plaintiffs' certainty or high probability of a lasting source of water is not to be interfered with unless directly taken away by legislative authority. It is for the defendants to shew that the deposit of some 10,000 yards of material in the bed of the river will not prejudicially affect the plaintiffs' works.

The case of Bickett v. Morris, L. R. 1 H. L. (Sc.) 47, decides that whatever sensibly interferes with the channel of the river is actionable, unless the Court is satisfied that there will not be any injury resulting from it, either now or hereafter.

If there is a reasonable prospect that it will produce any damage to the opposite or lower riparian owner, then that gives a right of action, although no actual injury is shewn to have resulted from it.

The plaintiffs have not satisfied me that they have received any injury, but the defendants have not satisfied me that there are no reasonable grounds for apprehending injury. On the contrary, I feel that the consequence of the defendants dumping their waste into the river will be to aggravate the trouble the plaintiffs now experience in dealing with gravel and stones which are being swept into their canal by the current, and that there is a reasonable prospect of injury resulting.

It was pressed upon me in argument that it was of public importance that the city of Nelson should be allowed to proceed with their work, and that the plaintiffs should be left to sue for damages when they are able to prove that they have received any. It is of far more importance to the public that the sacred character which the law attaches to private property should be respected. Blackstone says: "So great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . . The public good is in nothing more essentially interested than in the protection

of every individual's private rights, as modelled by the municipal law."

In connection with this last point I would call attention to the following remarks made by the Lords of the Privy Council in the case of Trinidad Asphalt Co. v. Ambard, [1899] A. C. at pp. 602-3:—

"One argument was addressed to their Lordships which, perhaps, ought to be noticed. It was said that digging for pitch was the common industry of La Brea, and that if an injunction were granted the industry would be stopped altogether. In the first place, there is no evidence that that would be the result. Whatever the result may be, rights of property must be respected, even when they conflict, or seem to conflict, with the interests of the community. If private property is to be sacrificed for the benefit of the public, it must be done under the sanction of the legislature, which can, and generally does, provide compensation. If the inhabitants of La Brea cannot dig their own pitch without invading their neighbours' rights, it is quite possible that the hope of reciprocal advantage and the apprehension of mutual liability may lead to some arrangement for their common benefit, or the difficulties of the case may induce the legislature to step in and regulate the digging of pitch and the management of the pitch lands."

The injunction will be continued, and the plaintiffs will recover their costs of this action.

BRITISH COLUMBIA.

(ASHCROFT.)

BOLE, CO. C.J. AUGUST 18TH, 1905.

COUNTY COURT OF CARIBOO.

GIBSON v. ADAMS.

Appeal — County Court—Summary Convictions Act, B.C.— Necessity for Entry of Appeal.

Appeal from a conviction under the Cattle Act whereby appellant was convicted of having unlawfully branded with

his own brand a steer not belonging to him, without the consent of the owner thereof. The appellant had filed with the registrar the notice of appeal directed by the Summary Convictions Act, B. C., to be served on respondent or on the convicting magistrate for him, but had not filed any entry of appeal.

D. Murphy, for respondent, took the preliminary objection that the appeal could not be heard, as no entry thereof had been filed with the registrar of the Court as required by sec. 72.

F. W. Howay, for the appellant, contended that the filing of the notice of appeal was a sufficient compliance with sec. 72, which was not meant to be read strictly.

BOLE, Co. C.J.:—In this matter I entertain no doubt whatsoever that the point raised by Mr. Murphy is fatal to the appeal. The words of the section are: "In every case of appeal to any County Court such appeal shall be entered for trial not less than three days before the day on which such Court shall be held, otherwise such appeal shall not be received or heard, and such entry shall be made by delivering to the Registrar of the Court a memorandum (R 2) signed by the appellant, or by his attorney on his behalf." And, according to a well known rule, the word "shall," in the absence of modifying words in the section or Act, is always considered as being imperative. And I can hardly conceive plainer words than these, "such appeal shall not be received or heard." To attempt to explain these away would, in my opinion, be to defeat the plainly expressed intention of the legislature, which in passing this section intended to safeguard the rights of the respondent to protection against frivolous appeals, as it enables the respondent three days before the trial to ascertain from the registrar if it will be necessary for him to produce his witnesses and prove his case, for when the appeal is not entered it is no longer necessary for him to do so.

The appeal, therefore, must, I think, be dismissed with costs.

EXCHEQUER COURT OF CANADA.

(BRITISH COLUMBIA ADMIRALTY DISTRICT.)

MARTIN, LOC. J. AUGUST 25TH, 1905.

TRIAL.

REX v. THE "NORTH."

Ship—Foreign Vessel—Illegal Fishing—Three Mile Limit—Seizure by Preventive Cruiser — Continuous Pursuit — Jurisdiction — Government of Canada — License — Forfeiture of Vessel.

Information by the Attorney-General for Canada against the foreign ship "North" for illegal fishing.

MARTIN, J.:—This case raises important questions relating to the fisheries of this province in general and to the extensive and valuable halibut banks of Vancouver Island in particular.

There is and can be from the evidence very little dispute about the facts, which are clear, and I find as follows:—That on the morning of 8th July last the foreign schooner "North," alleged in its statement of defence to be "navigated according to the laws of the United States of America," was hove to and unlawfully engaged in halibut fishing in Quatsino Sound, Vancouver Island, within the three mile limit, having all its four fishing boats, dories, out for the purpose; that on observing the approach in obvious pursuit, within the three mile limit and approximately four or five miles off, of the Canadian Fisheries Protection cruiser "Kestrel," she picked up two of her dories and stood out to sea; that the "Kestrel" continued in pursuit at her highest speed in the attempt to intercept the "North;" that in the course of that pursuit the "Kestrel" observed another dory, close to, and pulling hard from, the land towards the schooner, which dory the "Kestrel," after slightly deviating from her course, picked up and seized within the three mile limit, and after fixing her position by cross-bearings continued her pursuit of the "North," which she overhauled in about 10 to 12 minutes and seized, with the two first mentioned dories, about

1¾ miles outside the three mile limit. There were freshly caught halibut lying on the "North's" deck at the time of seizure, which in all the circumstances must be held to have been caught within the limit. There were also several tons of halibut in her hold, but it cannot be said where they were taken.

The schooner and the three dories were towed to Winter Harbour, Quatsino Sound, where the fourth dory was afterwards taken when it came in.

I may say that, quite apart from the admission of the master of the "North" of his knowledge of wrong-doing, no difficulty is experienced here in regard to fixing the various positions in issue, as was the case in Rex v. The "Kitty D.," 34 S. C. R. 673, because they were exactly established by cross-bearings.

So far as the two dories, taken within the limit, and their tackle, gear, and equipment, are concerned, it was not argued that they were improperly seized, but as to the schooner and the other dories it is contended on several grounds that the seizure thereof cannot be justified.

The first is, that no seizure can be made on the high seas for an offence committed within the three mile limit, which is merely an infringement of municipal or local laws or regulations, and not a crime, in the proper sense of that word, in which case it is admitted a seizure may be made where the pursuit is continuous. Here the pursuit was begun within the three mile limit and was clearly continuous, which in fact was not, nor could not be seriously disputed, for it would be as unreasonable to contend that its continuity was broken by stopping to pick up within the limit one of the best evidences of the commission of the offence, as it would be in the case of a constable in pursuit of a thief stopping to pick up the stolen article which the pursued threw away in the course of his flight. Indeed, the inference is stronger and the act more advisable in the case of a poaching vessel with her boats out in the ordinary course of fishing operations, because the boats are manned by members of her crew, who are a living and active part and parcel of her, engaged in breaking the law: see on the wide meaning of "fishing" and "preparing to fish" the case of Regina v. The "Frederick Gerring Jr.," 5 Ex. C. R. 164, 27 S. C. R. 271; the cases reported and cited in Stockton's Admiralty Digest (1894) on pp. 200 and 598-600; those on the Behring Sea Seal Fishery in this Court;

and on the same subject in the United States Court of Admiralty, the "James G. Swan," 50 Fed. Repr. 108; The "Kodiak," 53 Fed. Repr. 126; and The "Alexander," 60 Fed. Repr. 914.

As regards the rights of merchant vessels in foreign ports, it was said in the leading case of Regina v. Anderson, L. R. 1 C. C. R. 161, at p. 166, that—"When vessels go into a foreign port they must respect the laws of that nation to which the port belongs," though they may be there still subject to the laws of their own country as though they were on the high seas: ib.; R. v. Carr, 10 Q. B. D. 76; Marshall v. Murgatroyd, L. R. 6 Q. B. 31.

It has likewise been repeatedly laid down by the Supreme Court of the United States, adopting the language of Chief Justice Marshall in the celebrated case of The Exchange, 7 Cranch. 116, at p. 143, that:

"When merchant vessels enter (foreign ports) for the purpose of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . merchants did not owe temporary allegiance, and were not amenable to the jurisdiction of the country."

Followed in United States v. Dickelman, 92 U. S. R. 520; and Wildenhu's Case, 120 U. S. R. 1.

There is no case in the English or Canadian reports on this first point, but it has been dealt with by American Courts. Church v. Hubbart, 2 Cranch. 187, is a case where an American ship was seized by the Portuguese government outside of the three mile limit for a violation of the prohibition of the Crown of Portugal against all trade by foreigners with its colonies, or hovering off their coasts for that purpose.

. . . .

In Rose v. Himely, 4 Cranch. 240, the majority of the Judges of the same Court gave a decision which, it is true, cannot be reconciled with that just cited, but I draw attention to the fact that three of the Judges, Livingstone, Cushing, and Chase, JJ., did not express themselves on the present point, and Mr. Justice Johnson dissented. But the matter must, in my opinion, be considered as settled by the subsequent case of Hudson v. Guestier, 6 Cranch. 280, decided by the same Court, wherein Rose v. Himely is overruled, all the

Judges concurring, with the exception of Chief Justice Marshall, who gives an explanation (p. 285) of his misapprehension in regard to his former view being shared by certain of his colleagues. In that case it was held that a ship may be seized on the high seas for a breach of municipal regulations committed within the territorial jurisdiction. . . . In that case the capture was more than two leagues at sea, and the ship was condemned for trading to the revolted ports of the Island of Hispaniola contrary to the ordinances of France.

The Supreme Court of Louisiana in Cucullu v. Louisiana Insurance Co., 16 Am. Dec. 199, followed the principle laid down in Church v. Hubbart, supra. . . .

And, a fortiori, the right would exist after the territorial waters had been actually entered and violated.

This view is, as would be expected, to be found in the text-books on the subject. . . . (Reference to Woolsey on International Law, 6th ed. (1898), p. 71, par. 58, and p. 365, par. 212; Taylor on Public International Law (1901), p. 307, par. 262; p. 310, par. 267; Hall's International Law, 4th ed., pp. 213, 215, 263, 266; Phillimore's Commentaries on International Law (Am. ed., 1854), vol. 1, p. 179.) The case of Church v. Hubbart is refrerred to in the American note, but the editor does not seem to have been aware of the later and broader decision in Hudson v. Guestier.

This distinction between seizures made upon the high seas, which are the exclusive property of no nation, and the general property of all nations, and seizures made within the territory of another state, is, I find, illustrated in a striking manner by Lee on Captures in War (1803), p. 123. . . .

Over the waters within the three mile limit the chief heads of jurisdiction generally asserted by nations are four: (1) The prohibition of hostilities; (2) the enforcement of quarantine; (3) the prevention of smuggling; and (4) the policing of fisheries; and this last, involving the assertion and protection of the exclusive right of its subjects to fish within said limit, is certainly not the least important duty of a state. So far as this continent is concerned, it is of much consequence in view of the great value of the fisheries, and this "police jurisdiction" by the two nations chiefly concerned, Canada and the United States, has been acquiesced in for a long period, and is admitted, so it is unnecessary to discuss it. As regards the

North Atlantic fishery, its history is given by Wharton in his International Law Digest (1886), vol. 3, pars. 300-1; and see Hall's International Law, supra, 99 and 154, on British American fisheries generally. Though poaching of fisheries of a friendly nation is not essentially a crime, yet, as was said by the Supreme Court of Canada in Regina v. The "Frederick Gerring Jr.," supra, it is a "nefarious business" and one which "so far as Canadian waters are concerned has been prohibited and criminalized," and the cases hereinbefore cited shew that the governments of Canada and the United States have endeavoured rigidly to suppress the depredation of their waters by foreigners.

It follows from all the foregoing that the seizure herein was lawful. Such being the case, it becomes unnecessary to consider the question of the alleged extent of Quatsino Sound from Cape Cook to Topknot Point, on the "headland to headland" theory, which raises a very involved question which I see has been in recent years considered by the Supreme Court of Newfoundland in Rhodes v. Fairweather, 1 Newf. Dec. 321: see also an appeal from that Court on the same question in Direct U. S. Cable Co. v. Anglo-American Telegraph Co., 2 App. Cas. 394; and Mowat v. McFee, 5 S. C. R. 66.

The remaining question is that the government of Canada, as a result of The Fisheries Case, [1898] A. C. 700, is not vested with the authority to prevent any one from fishing and has no status except for revenue purposes; in other words, that, while it has the right to control, it has not the right to absolutely prohibit foreign nations, and that it is the Province of British Columbia and not Canada that has, if any one has it, the right of property in the fish, and therefore the federal government has no police jurisdiction. In view of the long continued undisputed exercise of this right by the federal power, as shewn by a perusal of the cases already cited, and others such as The "Grace," 4 Ex. C. R. 283, and Regina v. The "Henry L. Phillips," ib. 419, 25 S. C. R. 691, it would seem to be somewhat late to raise the point. Indeed it has been laid down in the former case, p. 288, as follows:—

"Now it is also an axiom of International Law that every state is entitled to declare that fishing on its coasts is an exclusive right of its own subjects, and therefore the Act respecting fishing by foreign vessels is strictly within the

powers of the Parliament of Canada, and we must look to that statute for the express authority to protect the subjects in their fishing rights, and for the penalties incurred by any foreign vessel for infringing those rights."

And then follows the reference to the statute shewing that it does in its first section provide for the issue of a license to a foreign ship, and the onus is upon such ship when fishing in our waters to prove its possession of a license: Regina v. The "Henry L. Phillips," supra. Here there is no evidence of a license, nor of the nationality of the owners; all before the Court on that point is that the vessel was navigated according to the laws of the United States. It was laid down in the Fisheries Case, at p. 713, that:

"It is impossible to exclude as not within this power (raising money) the provision imposing a tax by way of license as a condition of the right to fish. It is true that by virtue of sec. 92 the provincial legislature may impose the obligation to obtain a license in order to raise a revenue for provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention."

And further:—

"The enactment of fishing regulations and restrictions is within the exclusive competence of the Dominion legislature, and is not within the legislative powers of provincial legislatures."

While these rights are not proprietary, they are manifestly of such a nature that it is within the competence of the federal power to exercise the sovereign rights which have been delegated to it by the British North America Act, and protect, in the interest of the nation at large, those fisheries which it is authorized to regulate and license. I can find nothing in the Fisheries Case which goes to support a contrary view.

The judgment of the Court is that the schooner "North," her boats, tackle, rigging, apparel, furniture, stores, and cargo, are condemned and declared forfeited to His Majesty.

NORTH-WEST TERRITORIES.

(SASKATCHEWAN.)

PRENDERGAST, J. JULY 26TH, 1905.

TRIAL.

GWARTNEY v. OLESON.

Principal and Agent — Agent's Commission on Sale of Land—Quantum—Evidence—Corroboration.

Action for commission on sale of 238 acres of land.

T. D. Smith, Saskatoon, and Brown, Saskaton, for plaintiff.

J. D. Ferguson, Saskatoon, for defendant.

PRENDERGAST, J.:—The parties are agreed that $8 was the cash price put by defendant on his land, and that 25 cents an acre was to be the commission on a cash sale (whether such commission was to be paid out of the $8, as stated by plaintiff, or added to the $8, as sworn by defendant, does not matter; as the defendant has paid into Court, besides the costs then incurred, the sum of $60, equal to 25 cents per acre sold).

But plaintiff asserts that this is not the whole agreement; and that, while he was to have 25 cents on a cash sale of $8, he was to have all that he could get in excess of $8 on a time sale; and he is corroborated by his brother on that point.

It is easy to see at once how such an agreement could be made to work; in fact, how unreasonable and absurd it is; and for this reason it should not be held proven except by the most conclusive evidence possible.

William Stockford, however, called by plaintiff, in giving the conversation constituting the agreement, uses, as well as he can remember them, the same words as the parties, and I decidedly come to the conclusion that his testimony, on the whole, supports plaintiff's contention, inasmuch as the last stipulation (as he gives it) that plaintiff was to have all above $8 is clearly justified by the first condition that $8 was to be the cash price; or, in other words, that plaintiff was to have all the excess over $8 on a cash sale, and not on a time sale.

The sale, in fact (very far from being a cash sale at $8), was for $8.50,—$523 down and the balance in 5 annual instalments, with interest at 7 per cent.

Plaintiff, however, should be allowed for his services quantum meruit.

Having regard to the commission provided by the parties for a cash sale, as well as the fact that plaintiff's usual occupation seems to be that of a driver in a livery stable, and that he never had the means, up to then, of effecting a sale, I consider that the sum of $63 paid into Court by defendant constitutes, after deducting costs then incurred, a very liberal remuneration for such services as were rendered.

Judgment is for plaintiff for $63, which includes claim and all costs up to trial, to be paid to him out of the moneys now in Court, and balance of such moneys to be paid to plaintiff in full satisfaction of this judgment.

NORTH-WEST TERRITORIES.

(SASKATCHEWAN.)

PRENDERGAST, J. JULY 31ST, 1905.

TRIAL.

GRAVISTON v. JOHNSTON.

Landlord and Tenant — Lease of Farm — Crop Payments— Negligence and Want of Skill of Tenants — Action for Damages—Joinder of Defendants — Farming Operations —Conflicting Evidence—Damages—Costs.

Plaintiff alleged that in the early spring of 1904 he rented to defendant Richard Johnston senior, and his 3 sons, a certain quarter-section of land (but, according to his own evidence at the trial, only 100 acres) on the following terms: —He, (plaintiff) having already ploughed the land, to also furnish the seed, and defendants to put in and harvest the crop and plough the land back, for which they were to receive one-half of the crop; that the ploughing back on 75 acres was done so negligently and unskilfully by defendants that he (the plaintiff) would be able to raise a crop thereon the

following season only at great expense, if at all; that as to the remaining 25 acres, defendants neither harvested the crop grown on the same, nor ploughed the same at all, whereby plaintiff wholly lost the use of the land for the following season; and he claimed $1,000 damages and cost of suit.

Defendants put in separate defences, each alleging that he rented from plaintiff a distinct piece of 25 acres, and making separate answers to plaintiff's joint claim.

H. Acheson, Saskatoon, for plaintiff.

T. O. Smith, Saskatoon, and Brown, Saskatoon, for defendants.

PRENDERGAST, J.:—If an allotment of different parts of the 100 acres was made at first, defendants surely acted without regard to it in discing, harrowing, and ploughing back the land; in putting in, harvesting, hauling away, and distributing the crop; in using the horses and implements; and generally in carrying out all their farm operations.

In the same way the remonstrances which Johnston senior alleges he made to plaintiff on two occasions, with respect to the quantity of the land, were made in the name of all, and the relationship existing between defendants also makes it more likely that a partnership existed among them. Defendants, in my opinion, were properly joined.

Now, as to the claim with respect to the 75 acres.

It is to be observed, first, that the crop is not here in question at all. A great amount of evidence was gone into on this subject; but it is in no way alleged, either expressly or impliedly, that the crop on the 75 acres was not properly put in, nor that it was not harvested, or if harvested not threshed. There is no allegation of damage on that ground at all. The only damage claimed with respect to the 75 acres is on the ground that the ploughing was done negligently and unskilfully. To begin with, even if such negligence and want of skill were shewn, I should hold that damages resulting from the fact that plaintiff would, in the words of the claim, "be able to raise a crop on the said land during the following season only at great expense, if at all," are too remote.

I do not go so far as to say that they would be too remote in all circumstances. But they are too remote at all events in this case, where plaintiff does not shew at all that it was impossible for him on his part to have the ploughing done. In

the circumstances of this case, the damages could only be the cost of having the work done as it should have been done.

But did the defendants plough back the 75 acres unskilfully and negligently? Possibly a jury with more practical knowledge of the subject might so find. But I must confess that in presence of such a mass of contradictory evidence I am wholly unable to say that the weight of it is either on the one side or the other. There is for plaintiff's contention on this point, the evidence of plaintiff himself, and of Leslie Sloan, Charles Cox, Harry Sutherland, and John Burton. For the defence there are the four defnrdants, Gordon Johnston (a brother), William Dawson, George Olds, and Fred Maxwell. They all pretend to be practical farmers, they all pretend to have seen the ploughing back on the 75 acres; and yet the first are as positive in asserting that it was a poor job or no job at all as the others are in saying that it was a satisfactory or at least a good average job. One of the points on which plaintiff insists most strongly is that the ploughing back was too shallow; to which defendants reply, and to my mind prove rather conclusively, that when ploughing back on breaking after the first crop has been taken off, as in this case, such ploughing cannot be otherwise than at least as deep as the breaking, inasmuch as it is impossible to split the sod. There is also some evidence, although I will not say conclusive evidence, to support defendants' contention that they laboured under especial difficulties owing to the fact that the land was not in the condition plaintiff had represented it to be; that the breaking was uneven, that places were skipped, and more particularly that the discing was unsatisfactory. It seems to be established at all events that defendants complained of this at the beginning, and were prevailed upon to go on. On the whole plaintiff fails with respect to this item.

Then as to the 25 acres. The claim is on two grounds here: for failure to harvest the crop of wheat grown on this land, and failure to plough back. The defendants admit they did not harvest the crop nor plough back the land, but say that the crop having been destroyed by hail, plaintiff relieved them from the ploughing, saying that he had a man who would undertake the same in return for the crop which he would use as green feed. Plaintiff on the evidence may possibly have passed the remark in a general way that somebody whom he knew might be willing to do the ploughing for

the green crop; but it requires more than that to relieve one from the specific obligations of the contract. The conversation which Johnston senior says he had with his sons shews that he had decidedly made up his mind not to cut or plough back the 25 acres even before plaintiff relieved them of this duty, as he alleges; and this determination on their part is also a sufficient answer to their contention that when the present action was instituted there was yet time for them to do this ploughing. Defendants were then bound to plough back the 25 acres, and they should also compensate plaintiff for half of the crop of wheat thereon if the same was worth anything. But what was it worth? On 14th July, just when the wheat was heading out, a very bad hail storm had struck the locality and spread over 3 miles of it. The damage was considerable, according to all the witnesses, amounting even to complete destruction of the crop as a grain crop, according to some. I suppose it can be assumed safely that this particular piece of 25 acres could not be worth much, from the simple fact that defendants did not try to save it after having spent a good deal of labour upon it. Plaintiff himself admits that several farmers in the vicinity ploughed their crops under, although somewhat correcting the effect of this admission by adding that some of them were sorry for it afterwards. As to the effect of the storm, John Barton, called by plaintiff, says "wheat was not worth cutting;" William Dawson, "not fit to thresh;" and George Olds, who lives one mile from the land in question, says that his threshing of wheat gave 75 bushels to 25 acres, or less than three bushels to the acre. Plaintiff was entitled to have his share of the wheat, whatever it was worth, if not in the shape of threshed grain, at all events as green feed, and his half I value at $14.

The ploughing of land bearing a standing crop is worth more than stubble ploughing and generally costs more in the spring, and I value the ploughing of these 25 acres at $50. I do not see that plaintiff has produced any evidence besides his own, which is material, with respect to the two items as to which he succeeds in the action.

I have also considered whether defendants should not be allowed the costs of some of their witnesses. But the issues on which they succeed and those on which they do not are very much interwoven; much of the evidence is of a purely hypothetical and of a general character, and on the whole

I have concluded that they should not be allowed to tax any costs against plaintiff.

Besides the cases cited at the argument, I would refer to Lawton v. Reid, decided at the last sitting of this Court en banc. In this case damages were claimed for a shortage of crop alleged to have resulted from the poor quality of seed grain supplied by the defendant, and the judgment deals with the question of certainty in determining consequential damages.

Judgment is for plaintiff for $64 and costs, but no other witness fees are allowed than those of plaintiff himself. Counsel fee allowed at $15.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. AUGUST 1ST, 1905.

CHAMBERS.

RAT PORTAGE LUMBER CO. v. MARTIN.

Costs — Application to Stay Actions against Administratrix — Ascertainment of Assets of Estate — Payment of Creditors—Costs of Actions.

Applications were made by defendant Mary P. Nugent to stay the proceedings in three actions brought against the applicant as administratrix of the estate of George E. Nugent, deceased, and other defendants, and the proceedings were stayed accordingly. The question of the costs of the applications was reserved.

J. T. Brown, Moosomin, for defendant Nugent.

E. L. Elwood, Moosomin, for plaintiffs.

WETMORE, J.:—This estate was a very complicated one, and has only lately been disposed of. I am of opinion that the estate is liable to pay the costs of the applications to stay the proceedings in these cases. Unquestionably plaintiffs had the right to bring their actions, and in two of the cases there was another defendant, and the administratrix

was a proper person to join in suing him. I am of opinion that in all of those cases, therefore, there must be an order that the costs of these applications be paid by the administratrix out of the estate.

I was also asked to adjudicate as to whether the estate should bear the costs of the action down to the time of the stay of the proceedings. I do not know that this question properly arises on this application. The object of obtaining the stay of the proceedings was to enable the administratrix to ascertain what assets were available to pay creditors, and I presume the estate now is in such a position that she is able to plead, if it is necessary, plene administravit præter, or any other plea she desires to plead, and the costs of the action must depend largely upon what plea she pleads. But, assuming that plaintiffs are prepared now to come in and rank for their pro rata shares of what is available for payment of debts, I will state for the benefit of the estate that the estate is liable to pay the costs of the action in full down to the date of the stay of proceedings, and of course the advocate for the estate is entitled to his costs in respect to his services.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. AUGUST 1ST, 1905.

CHAMBERS.

DAKOTA LUMBER CO. v. RINDERKNECHT.

Appeal to Full Court—Security for Costs of—Grounds for Ordering—Poverty of Appellant—Disposition of Property.

Application by plaintiffs for an order requiring defendant to give security for costs of defendant's appeal to the full Court from judgment of WETMORE, J., 1 W. L. R. 481.

E. A. C. McLorg, Moosomin, for plaintiffs.

J. T. Brown, Moosomin, for defendant.

WETMORE, J.:—I am of opinion that this is a case where security ought to be ordered under the provisions of Rule 502 of the Judicature Ordinance. Leaving the affidavit of Mr. Fred. Elliott, sworn on 4th July, out of consideration in so far as it refers to defendant attempting to dispose of his property, the examination of defendant for discovery shews that, if he is telling the truth, his circumstances are such that he has not any property against which payment of costs can be enforced by plaintiffs, and that, as stated by the Court in Whittaker v. Kershaw, 44 Ch. D. 296, is insufficient to warrant an order for security being given. This is the latest case that I can find upon the subject, and the tendency of the authorities appears to me to be that poverty is generally a sufficient ground to warrant an order for security for the costs of an appeal being made. In this case, however, I think there is something more. While it does not very distinctly appear from defendant's examination for discovery that he has been disposing of his property to avoid payment of any judgment that the plaintiffs may recover against him, the circumstances under which he has at a recent date disposed of his property, handing it over to his wife and making her presents, gives it to my mind a very suspicious appearance. I think it is a case in which security should be ordered.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. AUGUST 4TH, 1905.

TRIAL.

MACARTNEY v. MILLER.

Fire — Setting out Fire — Injury to Adjoining Property — Prairie Fires Ordinance—"Let" or "Permit"—Abstaining from Action.

The statement of claim alleged that defendant wrongfully set fire to a quantity of wood belonging to plaintiff, and burned and destroyed the same; and in the alternative, that he set fire to some straw on land occupied by him and

allowed such fire to escape from such land on to plaintiff's land, where it burned and destroyed a quantity of plaintiff's wood.

E. A. C. McLorg, Moosomin, for plaintiff.

J. T. Brown, Moosomin, for defendant.

WETMORE, J.:—The whole question arises on the alternative claim. The evidence is contradictory as to whether the fire that went on to plaintiff's land and destroyed the wood was a fire set or kindled by defendant, or was another fire. The evidence is also contradictory as to whether this fire occurred on 5th November, 1904, or the 12th of that month. The evidence satisfies me, however, that it occurred on the 5th. The evidence on the part of plaintiff is to the effect that defendant set fire to some straw bucks which were on his land, that it spread from there over his land on to the plaintiff's, and so to a bluff in which the wood in question was, and destroyed the wood. The evidence upon the part of defendant was that the fire which so ran on to plaintiff's land was not the fire so started by defendant, but another fire that came down the same day from the north. There is no doubt, however, that a fire passed over defendant's land on to plaintiff's, and into the bluff in question, and destroyed the wood. The weight of evidence satisfies me, and I find, that the fire which so ran over defendant's land on to plaintiff's and destroyed the wood, was the fire that was set in the straw bucks by defendant. It is not necessary for me to state specifically why I have reached this conclusion; it is sufficient for me to say that the testimony produced on behalf of defendant is not in this respect satisfactory to me. I may, however, draw attention to one fact which both defendant and his wife set up, and that is that one Frank Mountain, who had at one time been defendant's hired man, was with him on the occasion of setting fire to these straw bucks, and assisted him. Both defendant and his wife were very certain as to that fact. The evidence, however, establishes to my mind beyond a doubt that on 5th November, when this fire took place, Mountain was not there at all, that he had left defendant's employ some few days before, and on 5th November was in Moosomin. And, even assuming that the fire took place on 12th November, Mountain was not there, he could not have been there. I do not wish to say that these persons have wilfully stated what is untrue concerning Mountain being there,

but their evidence in that respect is so very far astray as to throw very great discredit upon their memories.

Having found that the fire which did the damage was started by defendant, the next question is whether an offence was committed against clause (a) or (b) of sec. 2 of the Prairie Fires Ordinance, ch. 87 of the Consolidated Ordinances.

That section provides as follows:

"Any person who shall either directly or indirectly, personally or through any servant, employee or agent—

"(a) Kindle a fire and let it run at large on any land not his own property;

"(b) Permit any fire to pass from his own land;

"shall be guilty of an offence."

It was urged on behalf of defendant that no offence had been committed against this section because there was no letting or permitting upon the part of defendant; that the term "letting" or "permitting" involved the idea of action or abstaining from action. Conceding this to be true, I am of the opinion that there was on the part of defendant at least an abstaining from action. He started the fire; it is true that he stayed there for an hour or an hour and a half, but that is the longest time he did stay there, I find, and when he left, the fire was smouldering in the straw bucks, and a wind sprang up later in the day, which caused it to spread. According to his own testimony also, which I very much doubt, he burned some sort of a guard around the straw bucks before he set fire to them. If he did, the guard must have been insufficient for the purpose. It did not prevent the fire from getting away. If a person kindles a fire on his own land and does not properly watch it to see that it does not get away, and it does get away, he lets or permits it to do so; that is, he abstains from taking the action that he ought to have taken to have prevented it so getting away, and therefore he is guilty of an offence under the section of the Ordinance referred to. This holding is not at all at variance with what was held in Toleman v. Portbury, L. R. 5 Q. B. 288, or Wilson v. Twanley, 20 Times L. R. 440.

Having reached this conclusion, I must hold that defendant is liable to damages in this action by virtue of the sec-

tion of the Ordinance before referred to, which expressly gives a right of action. I assess the damages at $35.

There will therefore be judgment for plaintiff for damages $35, and costs.

NORTH-WEST TERRITORIES.

(SOUTHERN ALBERTA.)

HARVEY, J. AUGUST 11TH, 1905.

TRIAL.

PAUL v. KOBOLD.

Company—Shareholders—Call—Action to Invalidate—Parties—Addition of Company—Resolution—Forfeiture of Shares for Non-payment of Calls—Fraud and Collusion—Qualification of Directors—Payment of Shares—Irregularities—Meetings of Shareholders—Notice of Call—Meeting of Directors—Quorum—Adjournment — Meeting Protracted into Sunday—Costs.

Action by a shareholder and director of the Western Packing Company of Canada, Limited, on behalf of all the shareholders, against the remaining directors, for a declaration that a certain call and a certain resolution of the directors were void, and for an injunction to restrain defendants from forfeiting the shares of plaintiff and other shareholders for non-payment of such call.

W. L. Walsh, K.C., and O. W. Kealey, Medicine Hat, for plaintiff.

R. B. Bennett, Calgary, and G. D. Minty, Winnipeg, for defendants.

HARVEY, J.:—It was objected in the argument by counsel for the defendants who defended the action, two of the directors (Fewings and Smyth) not having entered any defence, that the action was not properly constituted, the company, which in reality it was sought to restrain, not being a party. I am of opinion that this objection was well taken, but, inasmuch as it was not raised in any way until the argument,

after all the evidence had been given as if the action were properly constituted, I think the application of plaintiff's counsel then made to add the company as a defendant should be granted, and I now add the company as a party defendant.

The company was formed in 1903 by letters patent under the Dominion Companies Act. No formal call appears to have been made, but it seems to have been the understanding when the company was formed that 50 per cent. should be paid on the stock subscribed. In the case of most of the shareholders this payment was made either in whole or in part, by the delivery over of assets, and the shareholders Milne, Crawford, Fewings, and Smyth, the value of whose assets did not equal 50 per cent. of their subscribed shares, gave demand notes to make up the deficiency. These notes appear to have been treated in the same way as the other assets, and share certificates were issued to all the shareholders shewing their shares paid up to the extent of 50 per cent. The company consisted of two shareholders, the defendants Kobold and McLeod, living in Winnipeg, where they had originally had a business which was put into the company, and other shareholders residing at or near Medicine Hat, most of whom had turned in cattle or other live stock as all or part payment of their contribution to the company's assets. In the beginning the president and secretary were Medicine Hat directors, the plaintiff being president for some time and manager of the business in his district. The affairs of the company did not prosper, and it was thought by some that the fault was that of the plaintiff, and, after some discussion among the directors, it was decided to give the whole management of the business to the Winnipeg directors, Kobold and McLeod. This was done by the retirement of the plaintiff and of the secretary and the election of Kobold and McLeod in their stead. Matters did not improve as had been hoped, and the Merchants Bank of Canada, the chief creditors, were pressing, and the result of an audit made for it shewing a large excess of liabilities over assets, an attempt was made by the directors to improve conditions by the introduction of new capital, and the buying in at a nominal sum of those shareholders who were unable or unwilling to make further advances. Most of the Medicine Hat shareholders expressed their concurrence in this scheme by giving the option asked for by the persons proposing to advance the capital, but the plaintiff and one or two others refused

to do so, and the scheme was frustrated. Matters continued to grow worse rather than better, and the necessity for some action became urgent. The Medicine Hat directors, and apparently the other Medicine Hat shareholders, were unable or unwilling to make any further advances, while the Winnipeg directors were willing to pay up the balance on their shares, and were of opinion that they could thereby, if they had the matter in their own hands, put the company's affairs on a paying basis, and it was decided that a call should be made of the amount unpaid on the subscribed capital. It was not expected that many, if any, of the Medicine Hat shareholders would pay the call, and it was understood that in that event the shares would be forfeited, and it was thought that the Winnipeg shareholders would then be able to carry on the affairs of the company so that no further liability would attach to the other shareholders. Plaintiff, who was not in the habit of attending the directors' meetings after he ceased to be president, as far as appears, was not a party to the understanding mentioned, but the 4 other Medicine Hat directors appear to have been quite aware of and to have approved of the proposed arrangement, and outside of the directors there were only 2 or 3 shareholders, and their holdings were comparatively small.

The meeting at which the call was made was held in Winnipeg on the 6th and 7th March, 1905, and was attended by the two Winnipeg directors, Kobold and McLeod, and two of the Medicine Hat directors, Milne and Crawford, and at a meeting held in Medicine Hat on 31st March, 1905, at which all of the directors except Paul and Kobold were present, it was unanimously resolved to forfeit the shares on which the call was not paid prior to 19th April following. Before the forfeiture had been effected, however, this action was begun and an interim injunction obtained, restraining such forfeiture.

The grounds on which plaintiff seeks to restrain the execution of the resolutions by the forfeiture of the shares, are that these resolutions were passed as the result of fraud and collusion between Kobold and McLeod, and some of the directors, and that there was irregularity in the proceedings.

It is alleged that Kobold and McLeod, in pursuance of a corrupt plan to obtain the whole beneficial interest in the company, paid or promised a valuable consideration to Milne and Crawford to induce them to join in the resolution for

the call. In my opinion, this allegation is not proved. It is true that Milne and Crawford each received a letter in the following terms:—"Dear Sir,—We beg to say that if you pay the amount of the note or notes given by you in respect of calls made prior to the 7th day of March, 1905, in respect of your stock in the Western Packing Company of Canada (Limited), and facilitate the cancellation of your stock for non-payment of a call directed to be made on or about the 7th day of March, 1905, we undertake that the Western Packing Company of Canada (Limited) will not enforce your liability to it in respect of the unpaid call of the 7th day of March, 1905, unless constrained to do so by the Merchants Bank of Canada or its assigns. Yours truly, H. V. Kobold, R. M. McLeod."

This letter was given after Milne and Crawford had interviewed their solicitors on the subject, and was framed in accordance with advice given to Kobold and McLeod by their solicitors. It promises nothing more than was conveyed in the understanding with Fewings and Smyth and than was intended in respect of all the other shareholders who could not pay the calls. It was such a letter as Kobold and McLeod were ready and willing to give to any shareholder who asked for it.

I am, moreover, of opinion that it conferred no rights on its recipient which are not given by secs. 49 and 50 of the Companies Act, but, as there was a by-law of the company conflicting with those sections and expressly authorizing the enforcement of payment of the call after forfeiture of the shares, it was apparently thought to be of some value.

I find no evidence whatever to support the conclusion that Kobold and McLeod were guilty of fraud or improper conduct in this or any other respect. It is true that the result of the action contemplated would deprive the other shareholders of any interest in the company and confer on Kobold and McLeod all its assets, but it appeared to the other directors, and I do not see how it could have appeared otherwise on the evidence then before them, or which subsequently came before me, that the condition of affairs was such that their interests were worthless unless something could be done which they were unable to do, but which Kobold and McLeod might be able to do, and they were willing to lose what they had put in if they could be relieved of liability on the unpaid portion of the shares.

As regards the question of irregularity, it is contended that Fewings, Smyth, Milne, and Crawford, not having paid up the demand notes given on account of the first 50 per cent. on the shares, under sec. 63 of the Act were not qualified to be elected directors. It is urged that the Act contemplates payment in cash, and reference is made to sec. 31. The Dominion Act does not expressly require payment in cash, as the English and some of the Provincial Acts do, and, in the absence of such provision, I cannot come to the conclusion that it is intended, but prefer to follow the view of the Supreme Court of New Brunswick in St. Stephen Branch R. W. Co. v. Black, 13 N. B. R. 139. If payment in cash were necessary, then the other directors were also unqualified, for they had not paid in cash but only in assets, which was what the provisions of the English Act were aimed at rather than a promise to pay cash. If, however, the directors had lacked the necessary qualification, acting on the authority of Dawson v. African Consolidated Land and Trading Co., [1898] 1 Ch. 6, I should be disposed to hold that their acts as such directors would be validated by virtue of by-law 44, which provides that all acts of any one acting as a director, notwithstanding that he was disqualified, shall be as valid as if he were qualified to be a director.

It was also urged that the meeting of 7th March was not properly convened. I cannot agree with this. The notice states that it is called by direction of the president, which was one of the authorized ways of calling a meeting, and I think it is incumbent on those seeking to establish irregularity to prove that such direction was not given.

It is also urged that the notice of call was not sufficient in form. I am of opinion that this objection is not valid. The notice sets out the resolution in exact terms, and adds a notice to pay the balance owing on the shares held by the recipient of the notice at the time and place specified. It is true that the amount is not set out in currency, but it must be assumed that each shareholder knew the amount of his shares and the amount paid on them, and, therefore, the amount he was required to pay. The notice, therefore, contained all the information necessary. It was further contended that notice was not given as required by the by-laws. The notice was sent by registered letter addressed to the proper address of the shareholder so as to reach him in due course more than 14 days before the day of payment, and

I am of opinion that under by-law 73, requiring 14 days' notice, and secs. 82 and 83 of the Act, there being no by-law inconsistent with these sections, the notice was sufficiently given.

The meeting of 31st March above referred to was a meeting adjourned from the 30th, and no notice was given of either of these meetings, but the meeting of the 30th purported to be an adjournment from 27th March. On 27th March, which was the date of a meeting called to be held in Mr. Fewings's office in Medicine Hat, Mr. McLeod telegraphed from Winnipeg to have the meeting adjourned to the 30th, and in pursuance of that Mr. Fewings wrote out minutes, simply adjourning the meeting as requested, and signed the minutes, and during the day obtained the signatures of Dr. Smyth and Mr. Milne, two other directors, at different times, there being only two present at one time. The by-law 26 of the company, as amended, provides that 3 directors shall form a quorum for the transaction of business. By-law 11, which relates to meetings of shareholders, provides that "5 members personally present shall be a quorum." In D'Arcy v. Tamar, Kit Hill, and Collington R. W. Co., 36 L. J. Ex. 37, Bramwell, B., at p. 39, says: "Now three directors were the required quorum, and in my opinion in order that they should act for the company, it was necessary that they should act conjointly and as a board of directors. I do not say they were bound to meet at any particular place or any particular time, but it seems to me they were bound to be together as a board at the time the thing was ordered to be done." This is approved and followed in In re Haycroft Gold Reduction and Mining Co., [1900] 2 Ch. 230. On these authorities I am of opinion that the meeting called for the 27th March lapsed, and the attempted adjournment was invalid. It was urged by the defence that, while there might not be a meeting sufficient to transact ordinary business, it was sufficient to adjourn, but I quite fail to see the distinction, and there is evidence that one director was misled, and, knowing the meeting of the 27th had not been held, was entirely unaware of the meetings of the 30th and 31st. I am, therefore, of opinion that the resolutions of the meeting of 31st March were invalid, and that, if no further action had been taken, plaintiff would have been entitled to a declaration to that effect. There was, however, a general meeting of the shareholders held on 20th May last, after the commencement of

this action, at which the shareholders, including the plaintiff, were practically all present in person or proxy with one exception. At this meeting resolutions were passed confirming the action of the directors in making the call and the proceedings thereafter, and authorizing them to proceed with the forfeiture in default of payment of the call and also instructing the company's solicitors to oppose this action for injunction. It is quite clear from these resolutions that the action of the directors was approved by the majority of the shareholders, and that the plaintiff in this action, if he represents any shareholders, represents only a minority, and it is too self-evident to require authority that the will of the majority in a corporation must govern so long as nothing illegal or beyond its powers is attempted, and I am of opinion that the ratification of the action of the directors overcame the defect arising out of the irregularity of the meeting.

It was shewn that the resolutions of the meeting of the shareholders of the 20th May were not passed until after midnight, and were, therefore, passed on the morning of the 21st, which was a Sunday, and it is contended that they were, therefore, invalid. No authority was pointed out to me, however, which seems to me to support this conclusion, and I am of opinion that the expression of the wish of the shareholders, though made on Sunday, was a perfectly valid expression and is entitled to have effect given to it.

Therefore, in my opinion, if the meeting of the 20th May had been held before this action was begun, plaintiff would have had no cause of action, and having been held after, it appears to me that the result of the action should be the same except as regards the question of costs. I feel some difficulty in disposing of this question. In the absence of special circumstances, I should consider plaintiff entitled to his costs of action, at least up to the date of the meeting of 20th May. I have, however, intimated that I consider the action improperly constituted, and if the directors or any of them should have been parties, it seems to me it should have been simply to answer the charge of fraud and collusion on which I have found in their favour. I have also found against plaintiff on all of the alleged irregularities except the one relating to the meeting of 31st March. I am further of opinion that but for plaintiff's opposition the affairs of the company might not have required the action which the

directors finally felt compelled to take, and that the most this suit could have accomplished would have been delay and a further embarrassment of the company. For these reasons I think I am quite justified in giving him no costs. I see no good object in the judgment making any declaration as to the resolutions of 31st March, in view of the subsequent action of the shareholders; and the judgment will, therefore, simply be a dismissal of the action and a dissolution of the interim injunction without costs to either party.

NORTH-WEST TERRITORIES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. AUGUST 11TH, 1905.

TRIAL.

JEWISH COLONIZATION ASSOCIATION v. BARATZ.

Gift — Intention—Incomplete Gift—Loan of Chattels—Detention —Replevin.

Action of replevin. Defence, that the articles replevied were given to defendant by one D. H. McDonald.

Ford Jones, Regina, for plaintiffs.

N. Mackenzie, Regina, and H. G. Wilson, Indian Head, for defendant.

NEWLANDS, J.—Defendant is one of a colony of Jews brought out from Europe by plaintiffs and settled near Qu'Appelle. Mr. James A. Smart, the then Deputy Minister of the Interior, at the request of plaintiffs, looked after the colony and provided them with what was necessary to start farming in this country. For this purpose he had been given £10,000 by plaintiffs, and he was given an absolute discretion as to its expenditure. Mr. Smart swears that he did not give the horses, cattle, and farming implements to this

colony, which included the plaintiff, nor did he ever authorize Mr. McDonald to do so, but that at some future time it was the intention, if these people stayed on their farms and became permanent settlers, to divide up this property amongst them and give it to them absolutely. I think the other evidence corroborates this, and that the property in question was not given to defendant, but was lent to him by plaintiffs to be used by him without paying for such use. Mr. Smart's intention at some future time to give this property to defendant was not evidence of a gift. There was no consideration and no contract which could be enforced, and nothing to alter the case between these parties.

In Am. and Eng. Encyc. of Law, vol. 8, p. 1313, the law is very clearly stated on this point as follows: "If anything remains to be done to complete the gift, what is undone cannot be enforced, it being without consideration. If left incomplete, there exists a locus pœnitentiæ, and what has been done may be reversed. It is therefore necessary for the validity of a gift that the transaction be fully completed, that nothing essential remains undone."

Mr. Smart's intention was never carried out, and another agent was appointed to look after the colony. This agent, instead of giving the property to the colonists, decided to sell it to them. Defendant refused to pay for his, claiming it as his own. Plaintiffs had therefore the right to replevy, and no further demand was necessary to be made or proved at the trial.

It was also urged by defendant that he came from Europe to this country on account of promises made to him there by agents of plaintiffs that he would be given the chattels claimed, and that there was therefore consideration given by him for these chattels. Upon this point, however, there was not, in my opinion, any evidence to shew that these persons were agents of the plaintiffs, or that they were authorized by them to make any such promises.

As the plaintiffs' advocate states that they do not wish damages for the detention of the goods, I will only give judgment for the plaintiffs for the goods replevied, with costs.

NORTH-WEST TERRITORIES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. AUGUST 14TH, 1905.

TRIAL.

BOYLE v. GRASSICK.

Principal and Agent—Agent's Commission on Sale of Land—Agreement for Sale Procured by Agent—Terms of Sale not Authorized by Principal.

Action for agents' commission on sale of land.

A. L. Gordon, Regina, for plaintiffs.

J. Balfour, Regina, for defendant.

NEWLANDS, J.:—Plaintiffs are suing for $500, which they claim as commission due to them for selling lots 18, 19, and 20, block 284, in the city of Regina, for defendant. There is practically no dispute as to the facts of this case. Defendant authorized plaintiffs to sell these lots for $9,500, $5,000 to be paid in cash, the balance in 3 equal instalments, with interest at 7 per cent. Plaintiffs in pursuance of this agreement obtained a purchaser for the property with whom they made the following agreement:

"Regina, Jan. 26th, 1905.

"Received from Smith & Fody, of Regina, N. W. T., the sum of five hundred dollars as earnest money on the purchase of lots eighteen (18), nineteen (19), and twenty (20), of block two hundred eighty-four (284), in the city of Regina, N. W. T., the whole purchase price being nine thousand five hundred dollars ($9,500).

"Five thousand dollars, of which this earnest money shall form a part, to be paid in ten days from the date hereof.

"Four thousand five hundred dollars to be paid in three equal annual payments with interest thereon at the rate of seven per cent. per annum.

"Sufficient transfer and notes secured by mortgage to be made, executed, and delivered by the proper parties at the time the first payment of five thousand dollars shall be completed. Provided, that if the said Smith & Fody shall fail to complete the first cash payment of five thousand dollars, the earnest money may be declared forfeited.

"Thirty days after the deal is closed allowed to vacate property.

"John H. Boyle & Co.,
"Agents for James Grassick."

Upon this agreement being communicated to defendant he refused to carry it out on account of Smith & Fody being in the same business as himself.

At the trial the defence was that plaintiffs had no authority to sell the property on the terms set out in the agreement just quoted, and that they were therefore not entitled to a commission.

In Dart on Vendors and Purchasers, p. 214, he states: "The principle underlying the law as to commission has been stated by Mr. Hart in his work on Auctioneers and House Agents as follows: 'An agent will be entitled to commission, or to an equivalent amount in the form of a quantum meruit or damages, when, as the result of his action, a person qualified to be a purchaser becomes willing or can be compelled to buy substantially upon the terms which the proprietor has expressly or impliedly intimated to the agent as those upon which he is able and willing to sell.'"

The question therefore is: Did plaintiff agree to sell this property substantially upon the terms which defendant had agreed to?

In McIntyre v. Hood, 9 S. C. R. 556, the defendant offerred to sell a property for $35,000, "one-third cash, balance in one year at eight per cent." The plaintiff accepted this offer to purchase for $35,000, payable "one-third cash on completion of title and balance in one year," and the Court held that there was no binding unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties. Strong, J., in giving judgment said (p. 565): "The offer was to sell for one-third cash, 'balance in one year at 8 per cent per annum.' By his letter the plaintiff proposes that the purchase money shall be 'payable one-third cash on completion of title and balance in one

year at 8 per cent.' These are not the same terms proffered by the defendant. The condition precedent to the payment of the one-third cash, that the title should be completed, is a variation from the offer, and an agreement concluded on the basis of it would not be the same contract as would have been constituted by a simple acceptance of the defendant's proposition. The expression one-third cash, I construe as an elliptical form of expression for 'one-third cash down at the time of acceptance of the offer.' And if the proposal had been expressed in this way, there could be no doubt that the stipulation for the payment of one-third of the purchase money would not have been subject to the condition precedent of a good title being shewn, but would have been a payment in the nature of a deposit to be made immediately on the acceptance of the offer. I can attribute no other meaning to one-third cash than that just mentioned, and if this is so, it is manifest that the plaintiff's letter was not such an absolute and equivocal accession to the terms proposed as to constitute an agreement between the parties according to the well understood and elementary principles of the law of contract. If there had been a simple acceptance of the defendant's offer, the plaintiff would, of course, have had a right to insist on a good title being shewn before completion; this would have been an implied term of the contract, as in every case of an agreement for the sale of real property, but what I hold is, that we cannot imply that such good title was to be shewn prior to the payment of the one-third of the purchase money which was to be paid in cash. Further, I am of opinion that the concluding paragraph of the plaintiff's letter of the 26th January, asking that the abstract and papers be sent to Mr. Hagel that he might get conveyance and give a mortgage, also amounts to a proposal of terms neither expressed nor implied in the defendant's offer. If there had been a contract on the basis of a simple acceptance of the defendant's terms, the defendant would not have been bound to complete by a conveyance until the two-thirds (residue) of the purchase money was paid, and this payment was postponed for a year; he could not have insisted on immediate completion, and compelled the defendant to accept a mortgage as security for this deferred payment, for such a mode of carrying the contract into execution would not have been stipulated for; and in the course of some years' experience in courts of equity, I have never heard it even seriously argued that a purchaser, the payment of whose pur-

chase money is postponed, has, without an express provision to that effect in the contract, a right to demand immediate completion by a conveyance, on the terms of securing the deferred purchase money by mortgage. No authority for such a proposition can be found, and the ordinary practice of courts of equity is against it. I, therefore, consider the words 'that I may get conveyance and give mortgage,' read in connection with the other part of the letter, as a proposal to carry out the contract in a different manner from that which was implied in the defendant's offer, and consequently, in this respect again, the acceptance was subject to a variation of the terms on which the defendant offered to sell."

In Gilmour v. Simon, 1 W. L. R. 417, which was a similar case, Dubuc, C.J., said (p. 421): "Another point raised is that the receipt signed by Egan shews that the sale made to Gilmour was for $50 cash paid as a deposit, and $950 to be paid on acceptance of title, instead of the $1,000 cash payment asked by Simon. The term 'on acceptance of title' is somewhat vague, as the purchaser might quibble on frivolous grounds as to the sufficiency of the title, and then deprive the vendor for a more or less extended period of the cash payment he would be entitled to receive. This was a term on which Egan admits he had no instructions at all from Simon. It is true that at the trial Gilmour said that he was willing to accept the agreement for sale held by Simon; but there is nothing to shew that he expressed such willingness at the time that the agreement was entered into; and the fact that such term was embodied in the agreement, which was drawn by Gilmour himself, shews that he wanted to take time to investigate the title, and that he would pay the $950 only when he would consider the title acceptable to him. Egan must, I think, be held to have exceeded his authority in agreeing to such terms with Gilmour."

On the authority of these two cases, I must hold that the sale made by the plaintiffs was not within the scope of their authority, and the defendant, not having accepted or ratified the bargain, is not bound by it, and that therefore the plaintiffs are not entitled to recover. The defendant asked $5,000 cash; the plaintiffs found a purchaser who paid $500 cash and $4,500 in ten days. This was neither authorized nor accepted by defendant. The term, too, in reference to the transfer and mortgage not having been mentioned by defendant is, according to the judgment of the Supreme Court of

Canada above cited, a variation of the terms offered by defendant, and therefore not within the scope of plaintiffs' authority. They have not found a purchaser willing to buy upon the terms laid down by the defendant, and they cannot therefore recover.

It was urged at the trial that defendant made no objection to these terms, but only objected to the purchasers because they were in the same business as himself. There is, however, evidence that he did not accept these terms, and, as I have found that plaintiffs were not authorized to make them, they would have to prove that these terms were ratified by defendant before they could recover. The evidence shews that this was not done in this case.

NORTH-WEST TERRITORIES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. AUGUST 19TH, 1905.

TRIAL.

MURPHY v. CANNING.

Promissory Note—Payment to Agent—Authority of Agent to Receive Payment — Notice to Maker to Pay to Principal.

Action upon a promissory note. Defence, that the amount due was paid to the agent of plaintiffs.

Ford Jones, Regina, for plaintiffs.

J. F. L. Embury, Regina, for defendant.

NEWLANDS, J.:—The facts of the case are that Mathieson and Morton, of Lumsden, took an order from defendant for a Bell organ, which they sold for the plaintiffs. The plaintiffs sent out a man to close the deal and forwarded the organ direct from their warehouse to defendant and took in payment a promissory note payable to plaintiffs, J. Murphy & Co., at their office, Regina. This is the note sued on, and it fell due on 4th January, 1905. On 15th December, 1904,

plaintiffs sent defendant a notice that the note was due on that date and would be found at the Imperial Bank, Regina, and asked him to provide for prompt payment. A notice was also sent to him by the Imperial Bank. On 5th January, 1905, defendant paid the amount due to Mathieson and Morton, Lumsden, who wrote plaintiffs that defendant had paid them the $150, asked them to return his note, and stated that they would credit the amount against commission. They afterwards, on 27th January, forwarded plaintiffs $25, and claimed the balance as due them for commission, and asked that defendant's note be returned. This plaintiffs refused to do until the whole of the amount of the note was paid to them. There was evidence to shew that Mathieson and Morton were agents of plaintiffs at Lumsden to sell pianos and organs for plaintiffs, that at the time of the sale to defendant they had no pianos or organs in stock, but sent the order to plaintiffs, who sent a man to close the deal, and afterwards forwarded the goods purchased direct from their warerooms in Regina. There was also evidence that in sales of this kind the purchasers had paid the amounts due to Mathieson and Morton, who had forwarded the same to plaintiffs, whereupon plaintiffs had returned the notes so paid to them.

I do not think that that evidence shews that Mathieson and Morton were agents of the plaintiffs to receive payment of notes taken for the sale of pianos and organs. I have no doubt that they would have taken the amount due from any person through whom the purchasers liked to send the amount and have returned the notes when so paid.

It is a rule as laid down in Smith's Mercantile Law, p. 156, that when the money is due on a written security it is the duty of the debtor, if he pay to an agent, to see that such agent is in possession of the security, for otherwise he will not be discharged unless the money reach the principal, or unless he can prove that the agent was really deputed to receive that money; and, as I have stated in this case, the evidence does not prove that the agent had authority to receive this money. All the evidence goes to shew that Mathieson and Morton had no power to receive this money, particularly the notices from plaintiffs and the bank to pay the money to another person, who then had possession of the note. After receiving that notice, he paid Mathieson and Morton at his peril. He could have protected himself by paying according to the notice, or could have inquired from plaintiffs as to the authority of Mathieson and Morton to receive payment:

Pratt v. Willis, 2 C. & P. 611. I think defendant constituted Mathieson and Morton his agents to forward the money he paid them to plaintiffs and obtain for them his note, and that, as between plaintiffs and himself, he is only entitled to credit for the amount they forwarded to plaintiffs, namely, $25. Judgment will therefore be for plaintiffs for $125 with interest and costs.

YUKON TERRITORY.

MACAULAY, J. JULY 24TH, 1905.

TRIAL.

GORDON v. SEABROOKE.

Attachment of Debts—Wages—Exemption—Board Money—Deductions—Construction of Judicature Act, sec. 395.

An issue directed to be tried between plaintiff and defendant, as follows:—"The plaintiff affirms and the defendant denies that he (the plaintiff) is entitled to an exemption under the provisions of sec. 395, and amendments thereto, of the Judicature Ordinance, on the moneys paid into this Court to the credit of a certain action therein pending wherein the said James Gordon is plaintiff and the said Joseph I. Seabrooke is defendant, which moneys were paid by one R. J. Campbell under garnishee proceedings issued in said action on the 26th day of June, 1905."

MACAULAY, J.:—The facts of the case are as follows. Plaintiff worked for Campbell and others from 3rd December, 1903, to 15th May, 1904, for the wage of 60 cents per hour, which plaintiff states amounted to about $5 per day and board, $1.50 per day being deducted from plaintiff's daily wage for board.

About the 14th or 15th May plaintiff received $195 on account of his wages, and he also received $20 which had been paid into Court, making a total of $215. In addition to that he received his board money, which at $1.50 per day would amount to $246 more.

Plaintiff alleges that the $111.33 paid into Court by Campbell, which is the subject of this issue, is exempt from attachment under the provisions of sec. 395 of the Judicature Act, which is as follows:—"Unless the debt sued for or in respect of which the judgment was recovered, has been contracted for board and lodging, the wages or salary of a mechanic, workman, labourer, clerk, or employee, shall not be liable to seizure or attachment unless such wages or salary exceeds the rate of $75 per month, and then only to the extent of the excess.

"(2) All payments which may have been made on account of such wages or salary during any period in which the same are being earned, shall be deducted from the above exemption."

It was contended by counsel for plaintiff that the amount paid to plaintiff or deducted from his wages for board, should not be considered as part of the $75 per month exemption, but that the $75 per month exemption should be allowed plaintiff over and above any amount paid for board.

This view taken by counsel I am unable to agree with, because had plaintiff been boarding with others than his employers, the $45 per month which was deducted from his board might have been paid to him to enable him to pay his board elsewhere. The board, having been paid each and every month during the period plaintiff worked for Campbell and others, I think clearly should be considered as a part payment of the amount of exemption allowed him, and I therefore hold that the $246 deducted for board from plaintiff's wages must be considered as a portion of the exemption allowed him by law. That would leave plaintiff a balance of $30 per month due him as exemption for the period in which he had worked as aforesaid, and this view is in accord with the contention made by counsel for the defendant.

The construction which I should place on sub-sec. 2 has presented more difficulties to me, counsel for defendant contending that it should be the literal construction, and that as plaintiff had a balance of $30 per month for about 5½ months, due him, or $165 exemption still owing to him, the payment to him of the $215 or the $195 was more than sufficient to pay the balance of the exemption money due him, and that therefore the $111.33 paid into Court could not be considered as money exempt under sub-sec. 2.

Counsel for plaintiff contended that as the whole wages were due plaintiff at the time the payment was made, and no application of the amount had been made by the employers, the law would presume that the money would apply as payment on the earlier debt due. This is in accordance with the common law rule. The law presumes in the absence of any application that payments should be applied to the earliest debt due, to prevent the Statute of Limitations running.

If I were to take the view contended for by counsel for the defendant, then a man working for a year at $200 per month for an employer, entitled to $75 per month exemption, and receiving payment in full at the end of the first 6 months of $1,200, would be liable at any time during the next 6 months to have all his wages attached, and not be entitled to any exemption whatever if he continued in the service of his employer, whereas if he changed his service and engaged to work with some other employer he would be entitled to exemption. This would be placing a premium on the man who only remained in the service of his employer for a short period, as against the faithful servant who continued for months or years in the service of one employer; and again, it is contrary to the principles of the common law. I do not think the legislature could have intended to place such a construction upon their Act, and I am of opinion that the $195 and the $20 additional paid plaintiff should be applied on account of the money first earned by him, and that he is entitled to an exemption of $30 per month for the balance of the time he was in the service of Campbell and others, which would be 3 months and 12 days, which would entitle him to an exemption, according to the figures before me, of $99.

I therefore hold that of the moneys paid into Court plaintiff is entitled, as exemption, to $99; the balance should be paid to defendant.

As this is the first time this question has arisen before the Court in its present form, and as neither party has succeeded fully in the contentions raised by him, I will allow no costs to either party on this issue.

YUKON TERRITORY.

CRAIG, J. JULY 28TH, 1905.

CHAMBERS.

NORQUAY v. BROGGIO.

Solicitor—Authority to Compromise Action after Judgment —Issue of Execution—Ex Parte Order.

Motion by defendant to set aside an order obtained by plaintiff on an ex parte application directing the issue of execution, in the circumstances set forth below.

F. G. Crisp, for defendant.

R. L. Ashbaugh, for plaintiff.

CRAIG, J.:—The plaintiff recovered judgment on 5th May, 1902, the solicitor on the record being D. Donaghy, the proceedings being indorsed "Donaghy & Macfarlane, plaintiff's solicitors." and Macfarlane then being a partner of Donaghy in the business of solicitors in Dawson, Yukon Territory. On the same day execution was issued and placed in the sheriff's hands, being issued, as appears by indorsement on the writ, by D. Donaghy, plaintiff's solicitor, but indorsed as well "Donaghy & Macfarlane, solicitors for the plaintiff."

The sheriff seized certain mining interests of defendant on 8th May, and on the 31st May he sent a letter of release to the Gold Commissioner releasing the claims from seizure, under instructions received from plaintiff's solicitors styled in the suit, as follows: "We beg to advise you that the defendant has paid $425 to release two properties. You will please hand the defendant complete release of his interest in the two properties and credit the amount, $425, on the execution. Donaghy & Macfarlane, plaintiff's solicitors." Upon this the sheriff released the properties from seizure.

The evidence shews that the wife of the plaintiff was the beneficial plaintiff, and the action was begun in the name of the husband, in whose name the mortgage security on which the action was brought, was taken.

The defendant came to town, and, according to his evidence, saw the plaintiff, who referred him to his solicitors.

This the plaintiff denies. It is in evidence, however, that the defendant saw Mrs. Norquay, the beneficial plaintiff, who referred him to her solicitor. He met Macfarlane—that is beyond a doubt—and he says the compromise was arranged by which he was to receive an absolute release of the execution and discharge of the debt for the sum then paid. Norquay admits having interviews with his solicitors, Donaghy & Macfarlane. He endeavours to qualify the effect of the interview by saying he discussed the matter with Donaghy. He admits that Macfarlane was present. It is clear that Macfarlane carried on the negotiations, whatever they were, with defendant, and gave instructions to the sheriff. Norquay was aware of the offer to this extent, that a certain sum was to be paid for a certain kind of release, and he intrusted the matter to his solicitors. Some time after, on 4th October, 1903, the following letter was written to the sheriff, signed "Donaghy & Macfarlane, per A. Macfarlane, solicitors for the plaintiff," the letter being: "Sir: Re the payment of $425 made by the defendant herein on the 31st day of May, 1902; this was really in full settlement of the claim, and the execution is therefore satisfied."

On 4th November, 1903, the sheriff made a return as follows: "By virtue of the annexed writ of execution issued out of this Court in this action bearing date the 5th day of May, 1902, I have caused to be made of the goods and chattels of the herein named Andrea Broggio of the value of $354, which money I had ready at the date and place of the said writ mentioned, and rendered the same to Horace Norquay named in the said writ, and I further certify that the said Andrea Broggio has no more goods and chattels in my bailiwick whereof I can cause to be made the residue of the moneys mentioned in the said writ or any part thereof, as I am by said writ commanded."

The matter remained in this state until April of this year (1905), when plaintiff, discovering that defendant had some further property, obtained an order ex parte to have the return of the sheriff set aside and a new writ issued commanding the sheriff to make the amount of the debt $1,277.75, the residue of the judgment recovered. In the order directing the issue of a new writ of execution leave was reserved to move to set aside the order, and a bond was taken to indemnify defendant as to the costs.

Apart from the question of the authority of the solicitor to compromise the action after judgment, other questions

were raised as to the right of the sheriff to seize the property which he did seize, being a dump of placer ground owned by defendant and other laymen in co-partnership. I do not think that question needs to be considered now, because, by mutual arrangement, the dump was washed up, and the share coming to defendant was paid into Court to abide the result of this motion, the main question being the authority of a solicitor.

The law upon this question is in a very unsettled and uncertain state. The old case of Sevory v. Chapman, L. R. 9 Q. B. 186 (1840), decides that "the authority of an attorney to conduct a suit does not extend to giving a discharge to a prisoner in execution on judgment in a suit without receiving the amount of the debt." . . .

[Reference to Levy v. Abbott, 19 L. J. Ex. 62; Swinfen v. Swinfen, 24 Beav. 556; Butler v. Knight, L. R. 2 Ex. 109; Lady De la Pole v. Dick, 29 Ch. D. 351; Regina v. Oxfordshire Justices, [1893] 2 Q. B. 149; Lovegrove v. White, L. R. 6 C. P. 440; Filmer v. Delber, 3 Taunt. 486; Hackett v. Bible, 12 P. R. 482; Watson v. Cave, 17 Ch. D. 23; Vardon v. Vardon, 6 O. R. 719; Jane Benner v. Edmonds, 19 P. R. 9; Stokes v. Latham, 4 Times L. R. 305.]

Stokes v. Latham was overruled by a decision of the English Court of Appeal in Neale v. Gordon Lennox, [1902] 1 K. B. 838, but that case went to the House of Lords, and there the decision of the Court of Appeal was unanimously reversed by the very strong judgment of Halsbury, L.C., concurred in by all the other law Lords, the consensus of opinion being, as expressed in the words of Lord Macnaghten, that "the Court is not entirely in the hands of counsel and bound to give the seal of its authority to any arrangement that counsel may make when the arrangement itself is not, in its opinion, a proper one," and that "a counsel has not authority to compel his client to refer an action which the client desires to try in open Court."

Up to this time I think that the weight of authority is against the conclusion of the House of Lords, that counsel has power to compromise and settle an action in his discretion. The only question which seemed to me to remain in doubt was as to the extent of the authority after judgment, but that later authority affects the question before judgment, and if, as in this case, which was one of libel and slander, the solicitor has no power to exercise a discretion in the mat-

ter, where can he exercise it? I am afraid that no help can be got from the authorities to tell us in what cases or what class of cases the authority of a solicitor would go so as to enable him to effect a compromise or a settlement of an action. In the case of Het. v. Pun Pong, 18 S. C. R. 290, it was held that a solicitor was bound by virtue of his retainer to recover a debt, to see to the registration of a judgment in the proper office and to proceed to the collection of the debt by all the means which a skilful attorney should employ for that purpose, and Strong, J., said: "I am of opinion, however, that consistently with the authorities it cannot be held that a retainer to prosecute an action to judgment terminates with the recovery of the judgment, nor that such retainer does not by itself make it the duty of the attorney or solicitor without further instructions to proceed after judgment to endeavour to obtain the fruits of the judgment." Most of the old cases were considered in that judgment, and that was the conclusion arrived at.

It would seem to me from the practice of the Courts and from the relationship in which the solicitor stands to the client that a solicitor in an action has a wider and more extended authority than an ordinary agent acting for a principal. The client, apart from instructing him and empowering him to do certain acts in his professional capacity in which he is skilled, confides as well in his judgment and trained ability, in his opinion and advice, as well as in his technical knowledge. I do not think that that is an unfair way in which to place the relationship between the parties. If that is so, then the client impliedly gives his solicitor a discretion which if used fairly and in the best of faith would be used for the client's benefit. The solicitor is the client when he receives the retainer, and he has, beyond the bare retainer to do his work, a right to use his trained judgment, his knowledge and discretion, in the interests of his client, and using them fairly I think the client should be bound by the acts of his solicitor both before and after judgment, that is, so far as it affects the recovery of the fruits of the judgment. In the case before us we have the facts that, first, the solicitor was authorized to issue execution, that after execution he consulted with his client as to the recovery of a certain part of the fruits, very clearly shewing a discussion between them as to the offer made by the defendant to pay a certain amount for a certain release. There can be no doubt upon the evidence that that was so, the only difference

between them being that the plaintiff contends that the payment was to effect a release only of certain property seized, but the execution was to remain in force so far as it would affect any other goods or chattels of the defendant. But here we have the plaintiff intrusting his solicitor with the conduct of a settlement of some nature. He recognized him as acting for him; he took the fruits of that settlement. He did not inquire further into the matter. A long time elapsed between that settlement and this motion, and I think we have the right to infer, and I do infer, that there was an implied authority at least given to the solicitor to act with the defendant as he saw fit. That there was a compromise I think we can also infer. Although the letter written at the time affected only certain mining claims, yet we have the evidence of the defendant that the payment was made for a complete settlement and satisfaction. We also have the letter of the solicitor confirming the evidence of the defendant that the payment was in satisfaction of the entire debt. It is true that that letter was not written until long after the settlement, but it is undisputed and admitted that these letters are written by the solicitor or his partner. It is also in evidence that at the time Macfarlane wrote this letter he was not a solicitor in good standing on the books of this Court, not having paid his fees for that year, but it must also be remembered that the settlement was not made during that year, but in a year in which he was in good standing, and his letter is only a matter of evidence of what did occur at the time, and was written while he was a member of the firm of solicitors. Both Donaghy and Macfarlane, solicitors for the plaintiff, have left the country. I asked that some evidence be obtained from them, but neither party seemed to be willing to incur the expense of sending to the outside for it. I regret that I did not insist on that, but I must take it that a solicitor of this Court would not sign a letter of that kind unless the facts were as he states, particularly as his statement is confirmed by the defendant and by the general course of dealing in the matter.

I will not consider the other questions raised as to the right to obtain this original order ex parte, there being sufficient security, I understand, to cover the costs.

My judgment will be that the order and the writ based upon it be set aside, with costs.

YUKON TERRITORY.

AUGUST 1ST, 1905.

FULL COURT.

CARBONNEAU v. LETOURNEAU.

Execution — Irregularity — Judgment — Amendment —Praecipe—Signature—Motion—Waiver.

Appeal by plaintiffs from an order of DUGAS, J., in Chambers, of 13th March, 1905, 1 W. L. R. 273, dismissing an application of plaintiffs for an order vacating and setting aside with costs the writ or writs of fieri facias issued on behalf of defendants on 7th September, 1904, against the goods and lands of plaintiffs, and directed to the sheriff of the Yukon Territory, to recover the sum of $6,222.39, taxed costs, under a judgment of the Supreme Court of Canada dated 12th August, 1904, and all proceedings, if any, had and taken thereunder.

The appeal was heard by CRAIG and MACAULAY, JJ.

T. D. Pattullo, for plaintiffs.

August Noel, for defendants.

MACAULAY, J.:—After hearing the argument in Chambers the learned Judge states in his judgment that he suspended the proceedings and had the judgment referred back to the Supreme Court, which has since corrected the same by adding that the costs of all the Courts are to be borne by the plaintiffs personally. He also says in his judgment that the judgment as filed had omitted, evidently through a slip, to adjudicate these costs against plaintiffs personally, and there was a doubt as to the right of defendants under it.

The judgment was returned by the Supreme Court amended, and the learned Judge who heard the motion was of opinion that, as a slip had occurred, the execution under the said judgment should stand.

It was also a ground of appeal by plaintiffs that the præcipe on which the writ or writs were issued was irregular, in not having been signed by the solicitors for the defendants, their names having been inserted by typewriter. This

Court, as stated by the Judge who heard the motion, has heretofore expressed its opinion that such an irregularity was not sufficient to warrant a proceeding being set aside; consequently the judgment could not be reversed on that ground.

It was argued by counsel for the appellants that according to the judgment of the Supreme Court of Canada of 12th August, 1904, no personal order for costs had been made against the plaintiffs, and consequently no execution could be issued against plaintiffs on the said judgment; that the Judge in Chambers was wrong in holding that the judgment of the Supreme Court had omitted through a slip to adjudicate the costs against the plaintiffs personally, there being nothing in the material before the Judge in Chambers justifying such a finding.

Other grounds were also urged, as set out in the notice of appeal; among them, that the Judge in Chambers had power only to dispose of such application on the material before him; that the amended judgment of the Supreme Court was not properly before the said Judge in Chambers; and that the only material properly before the Court en banc on this appeal is the material before the Judge in Chambers on the argument of the motion.

Numerous authorities were cited by counsel for the respondents to shew that the Court had power to amend a judgment if a slip were made, or correct an error of its own officers, in order to prevent an injustice being done to the parties, where such an error was manifestly a slip or clerical error.

At the close of the argument the Court reserved judgment and requested that it might be shewn the reasons given by the Supreme Court of Canada for amending their judgment of 12th August, 1904 before delivering judgment in this action. A certified copy of the judgment of the Supreme Court is now before us, and I am of opinion that that judgment should remove any doubts from our mind. The judgment of the Court was a short judgment, which was delivered by Girourard, J., on behalf of the Court, and is as follows:—

"We think that the motion to amend the minutes of our judgment should be granted. At the time the case was argued we were told by both parties that a sum of $10,000 was in Court pending the appeal. It is alleged that the moneys have been withdrawn by the respondents, and it is contended that in consequence there is some doubt as to the meaning of our judgment. We believe there is none, but to remove

the possibility of a doubt we will amend the judgment by adding the following words: 'with costs in all said Courts to be paid by the said respondents to said appellants forthwith after taxation thereof.'"

That judgment of the Supreme Court of Canada, in my opinion, is clear. They state that in their opinion the judgment delivered by them on 12th August, 1904, was broad enough in its terms to grant a personal judgment for costs against the plaintiffs, and that consequently execution was properly issued upon that judgment. They do not admit that there was any slip or error in their judgment.

The Supreme Court having expressed its opinion as to what its own judgment contained, I do not think we can decide that its judgment should bear a different construction from the one the Judges of that Court place upon it themselves.

According to their judgment, delivered on 26th October last, on the motion to amend, they were of opinion that their judgment was one upon which execution should be rightly issued; consequently, in my opinion this appeal should be dismissed with costs.

CRAIG, J., gave reasons in writing for agreeing, with some doubt, that the appeal should be dismissed, but was of opinion that the dismissal should be without costs.

YUKON TERRITORY.

AUGUST 7TH, 1905.

FULL COURT.

ALASKA MERCANTILE CO. v. BALLENTINE.

Summary Judgment—Promissory Note—Mortgage—Mining Claim — Representation Work — Defence — Conditional Leave to Defend—Terms—Costs.

Appeal by defendants from order of MACAULAY, J., in Chambers, striking out the appearance of defendants and directing judgment to be entered for plaintiffs.

The amount claimed was alleged to be the balance of principal and interest of a promissory note for $2,764.44, signed by defendants on 23rd October, 1902, and duly indorsed to plaintiffs.

The appeal was heard by DUGAS and CRAIG, JJ.

F. J. Stacpoole and George Black, for defendants.

J. B. Pattullo, for plaintiffs.

DUGAS, J.:—It would appear by the affidavits that on the day the note was signed a mortgage was given upon a claim, No. 15 below discovery on Hunker Creek. By their action the plaintiffs gave credit to the defendants to the amount of $1,219.57 The defendant R. A. Ballentine, by his affidavit, claims that a credit of $1,500 should have been given. In fact the amount was paid on 15th May, 1903, but it is alleged on behalf of plaintiffs in the affidavit of Mr. Marston, their manager, that by the books of the Ames Mercantile Company, with whom the debt originated, but now represented by the plaintiffs, the note and the mortgage were given to cover what was then actually due by defendants as well as future advances.

Mr. Marston further says that at the time of the payment of the $1,500 the defendants had obtained goods to the amount of $280.43 over and above the amount of the note and of the mortgage, and that this sum of $280.43 was applied to the payment of this surplus.

It is noticeable that R. A. Ballentine in his affidavit declares that the defendants paid the $1,500 on account of the note. The other defendant, James M. Ballentine, is absent and does not give his affidavit.

It is not made clear that R. A. Ballentine himself paid that amount.

On the other hand, on behalf of the plaintiffs, it would appear that Marston only knows of that payment by the books of the company, as he was not then in their employ in Dawson.

The books shew that credit was given on account of the note and mortgage to the amount of $1,219.57 only, whilst the balance, $280.43, was entered as paying that surplus.

The defendants object, first, that they have shewn a bona fide defence as to the amount due; 2nd, that the right of action on the promissory note is lost by merger of the same in the mortgage; 3rd, that the plaintiffs, having obtained a renewal of the lease of the claim mortgaged, hold the same subject to the mortgage, and, therefore, to the use of the defendants as such mortgagors.

Authorities have been cited and the principles are clear on both the last subjects. But the facts in this case are

entirely different. Even if it were accepted that the mortgage is proven in such a way as to permit us to take cogni ance thereof, there is nothing to bring us to the opinion that this mortgage is anything else than a collateral security for the then indebtedness of the defendants and for future advances.

But the mortgage is not produced. We do not know anything else of it than what the affidavits in the record mention, and, therefore, in my opinion, we cannot consider it.

The same objection applies to the third point raised by the defendants, that the plaintiffs hold the claim in trust for them; but, even if I were to accept as legally proven the facts submitted, I cannot see that they would sustain the defendants' pretensions.

The notice given by the plaintiffs that they would sell the claim within 5 days under the mortgage was left without effect, so much so that this notice having been given on 31st July, we see the defendants on 1st August transferring the same claim with other properties to one Lennox for the benefit of their creditors.

The fact of the plaintiffs having represented the claim does not change the position, as it was done at the instance of the defendants and to satisfy the regulations so as to avoid forfeiture.

This did not give possession to the plaintiffs. It was only money advanced to protect the interests of both parties.

It appears that subsequently the claim lapsed because the license was not renewed. With this the plaintiffs had nothing to do. The responsibility for the claim lapsing rests with the defendants or with Lennox. The plaintiffs, therefore, never were in possession of the claim until then and have no account to render, as an ordinary mortgagee in possession would have.

Afterwards, when the claim had returned to the Crown, they had the upper half of the said claim staked in their behalf. There is nothing to prove that implicitly or explicity there ever was any understanding that under this new staking they were to hold the claim for the defendants.

In the case of Chappelle v. The King, the Privy Council has settled that all interests in a claim cease at the end of each year and that all renewals were new grants. It being so, the defendants cannot be recognized after this location by plaintiffs as having any more interest in the claim unless

by some understanding with the plaintiffs, which understanding does not appear.

I may here mention that in this case, as in several other cases, too much is left to be determined by the Court as to the meaning of certain words or as to what is contained in the regulations, which are simply orders in council which, for one, I hold, must be proven, at least by production. Personally the Judge may know what representation work means as well as what the regulations are, but the Court does not.

This has been noticed already by some Judges of the higher Courts.

For the reasons above given I am of the opinion that the position taken by the defendants as to the second and third points raised cannot be sustained.

The only question which perhaps can be raised in the case concerns the application of the sum of $280.43, as there is no positive evidence to satisfy us on the point. Yet the position of plaintiffs seems to me stronger than that of defendants, as there is no doubt that at the time their credit to the amount fixed by the note and the mortgage had been exhausted, and that there was an indebtedness to plaintiffs for a further sum of $280.43. The books of the company shew that part of the $1,500 paid went to extinguish this last indebtedness.

R. A. Ballentine, in his affidavit, does not remove the presumption which this entry in the books creates in favour of the plaintiffs, for he does not shew that this payment was made by him.

However, in the circumstances, it might be said that a doubt remains as to what did really happen, and, as far as that goes, defendants might be entitled to establish their pretensions on the point.

The case of Jacob v. Booth, Annual Practice, 1905, vol. 1, p. 219, based upon the simple principles of justice, goes very far as to the rights of any defendant to defend, and, personally, I believe that no party should be deprived of the right to establish before the courts of justice whatever rights they may claim to have, howsoever weak they may be.

I believe, therefore, that the defendants should have been allowed to defend themselves, but as, in reading the record as a whole, I cannot help feeling that there is a taint of bad faith on the part of the defendants, who appear to me as trying to escape the payment of a just debt or obtain delays to

which they are not entitled, I would impose the following terms:

1. Within 15 days they should deposit in Court the amount claimed.

2. The bond given as security for the costs of this appeal should remain alive until the final determination of the case.

3. In the event of the defendants neglecting or refusing to make such a deposit within the delay fixed, then the appeal should be dismissed with costs, otherwise the appeal should be allowed, but with costs reserved to follow the event of the suit at the trial.

4. An early trial should take place.

CRAIG, J.:—The objections to the order raised on the argument were: that there was a bona fide difference as to the amount due; that the right of action in the note was merged in a mortgage bearing the same date as the note; and that the plaintiffs, having obtained renewal of leasehold, that is, of a mining claim on which the mortgage was given, can only hold the renewal lease subject to the mortgage and to the use of the defendants.

Involved in this third objection is a contention that plaintiffs have made profit out of the claim and should account. The affidavits disclose these facts: that the note was given for a merchandise account, that the mortgage was taken as collateral, and there was no intention whatever to create any merger of the note in the mortgage, the one being collateral to the other; that, besides the merchandise account covered by the note, there were further advances made; that while the defendants paid $1,500, part only, namely, the amount allowed by the plaintiffs in their action by way of credit, was credited upon the note, the balance being carried to the general account and credited upon it. So that upon the evidence, as we now have it, it appears that the claim of the plaintiffs is a substantial and valid one, and the only defence which is suggested is the third which I have mentioned.

As to the first, I don't think there is any bona fide difference as to the amount due, but there may possibly be such. I do not think that the defendants have shewn at all that any merger was created.

As to the third objection, the evidence shews that notice of sale was given under the mortgage, but no action at all taken upon that notice, it being allowed to lapse, and no possession was taken of the claim under it; that the defendants, being in financial difficulty, asked the plaintiffs to assist them in the representation of the mining claim, such representation being required under the mining regulations of this territory to preserve the claim alive. It was to the interest of both parties that this claim should be kept alive to be of any value,—both to the defendants as owners and to the plaintiffs as mortgagees; that the plaintiffs did go on and do representation work to the extent of $200, but on attempting to renew the claim, based upon that right, they found that they could not do so without a mining license, that a mortgagee has no standing under the mining regulations (at least it was so ruled by the officials), to renew a claim himself. The defendants took no part in aiding the plaintiffs (the mortgagees) to effect a renewal. They had, prior to the work being done, assigned all their interest to one Lennox as assignee for the benefit of creditors, and Lennox had lost the mining license or some of the papers which were necessary to be produced to enable a renewal to be effected. There is no evidence whatever that the plaintiffs entered into possession of the claim. The defendants do not swear that one cent of money was ever derived from the working of the claim of which an account could be given by the plaintiffs. It is a loose answer, thrown together more by way of insinuation and suggestion than of swearing to any positive facts upon which the Court could base any determination as to the rights of the defendants. As to the value of the claims, of course that cannot be determined now. Subsequent to the failure to renew the claim under its old title the claim lapsed to the Crown and became open for staking the claim to be staked and assigned to them. The claim to the wor'd. Thereupon the plaintiffs caused one-half of originally being a 500-foot claim, has by the regulations been reduced to two 250-foot claims, the law now being that not more than 250 feet can be staked. So that the plaintiffs had not the full claim as originally staked, but only one-half of it. Whether or not they hold that as trustees for the benefit of the defendants I will not determine. What arrangement was made, what understanding was had, cannot be told. As I said, there is no more than an insinuation or suggestion of that kind raised by the defendants' answer. The whole defence seems to me to be most suspicious and what one might

call a sham. But I hesitate, under the decision of Jacobs v. Booth, 85 L. T. J. 262, to refuse them a right to raise this defence, if any such defence exists; but, viewing the defence as I do and as being suspicious, they will only be allowed in to defend on terms, and the terms will be that they pay into Court the amount of the debt claimed; that the bond filed as security for the costs of the appeal remain in full force until the determination of the action; and that the costs of this appeal abide the result of the trial. The money must be paid into Court within 15 days from the date of this judgment, otherwise the appeal to be dismissed with costs.

YUKON TERRITORY.

CRAIG, J. AUGUST 9TH, 1905.

CHAMBERS.

WILLS v. TIMMINS.

Security for Costs—Plaintiff Residing abroad—Discretion—Property in Jurisdiction.

Motion by defendants for security for costs under Rule 528, which provides that "when the plaintiff in an action resides out of the Territory, and in any other case where by the practice and procedure in England a defendant is entitled to security for costs, and the defendant by affidavit of himself or his agent, alleges that he has a good defence on the merits to the action, the defendant shall be entitled to a summons to shew cause why an order should not issue requiring the plaintiff within three months, or such other or further time as the Court or Judge deems right, from the service of the order, to give security for the defendant's costs.

A. Noel, for defendants.

F. J. Stacpoole, for plaintiff.

CRAIG, J.:—The plaintiff's solicitor, who swears that he has knowledge of the matters deposed to, testifies that the plaintiff is the owner of a mining claim worth $1,000, other property consisting of the Aurora Dock and Warehousing

for the claimant that the property in the goods is so clearly shewn as to warrant me in dismissing the sheriff's motion for interpleader. I think there are enough suspicious circumstances shewn to warrant an issue being directed; but the execution creditor must take the burden of being plaintiff in the issue.

There will be the usual order as to sheriff's costs.

YUKON TERRITORY.

CRAIG, J. AUGUST 10TH, 1905.

CHAMBERS.

THOMAS v. CLARK.

Judgment — Default Judgment — Failure to Comply with Order for Security for Costs—Judgment Issued ex Parte —Terms of Order — Motion to Set aside Judgment — Merits.

Motion by plaintiff to set aside a judgment dismissing the action.

F. L. Gwillim, for plaintiff.

Frank J. McDougal, for defendants.

CRAIG, J.:—The plaintiff is resident out of the jurisdiction, and on 24th October last an order was made by Mr. Justice Dugas for security for costs within 7 months from the date of the order and for a stay in the meantime, and it was further ordered that in default of the security being given, the action be dismissed unless the Court or Judge, on a special application for that purpose, otherwise orders. On the expiry of the time limited by this order, no bond being filed, defendant Clark, the only defendant served with process, moved to dismiss the action. The plaintiff by his counsel opposed that motion, setting up various grounds of a technical nature, which were overruled by my order of 15th June; but I allowed one month's additional time to perfect the security, and by that order provided that "the plaintiff's action be and the same is hereby dismissed as against the

defendant unless the plaintiff do within one month from the date of the order give security." Upon the expiry of the time limited by the last order, no bond for security being filed, the defendants signed judgment. No motion was made to dismiss the action, but upon simple evidence of default of the filing of the bond under that last order, the clerk of the Court signed judgment. The plaintiff did not move for further time. He was notified of the signing of the judgment, and served with the bill of costs and notice of taxation, and did not attend upon the taxation. But now on further advice that some mistake or misunderstanding took place as to the time, he asks to have the judgment set aside and to be allowed in to prosecute this action. He objects that notice of motion should have been given before judgment, and an order formally dismissing the action taken out, on the ground that the service of the order for security was not proven, and that the recital in the order is not sufficient to warrant an entry of the judgment, and upon the merits and the hardship to the plaintiff he asks to have the order set aside.

The notice of motion of the plaintiff does not set out these grounds, and the defendant objects that under Rule 467 the grounds should be set out in the motion. There is some doubt upon this question as to whether a formal motion should be made upon default in complying with an order for security or not; but I think the best opinion is that no such motion is required, particularly in this case under the second order. The Rule is 528, which provides that "when the plaintiff in an action resides out of the Territory, the defendant shall be entitled to a summons to shew cause why an order should not issue requiring him within 3 months to give security, and that in default of such security being given, the action be dismissed with costs unless the Court or Judge on a special application for that purpose otherwise orders."

In the final order giving the extra month, it was provided that on default, "the action be and is dismissed."

The case of Hollender v. Ffoulkes, 16 P. R. 225, is, I think, an authority that judgment may be signed ex parte on default; also the case of King v. Davenport, 4 Q. B. D. 402; also Newcombe v. McLuhan, 11 P. R. 461; also Burns v. Chisholm, 2 Ch. Ch. 88.

I do not think, under our practice, that in such an order as this which I am considering, it is necessary to make any motion on notice; judgment may be signed ex parte.

As to the merits of this application, the plaintiff was allowed an extra time in the first instance of 7 months. He was again allowed the additional time of one month, and I do not see that he is entitled to any consideration now. So that the motion to set aside the judgment will be dismissed with costs.

YUKON TERRITORY.

CRAIG, J. AUGUST 12TH, 1905.

CHAMBERS.

BURNS v. MUNN.

Receiver — Equitable Execution — Contract with Crown— Profits—Guarantee Money.

Motion by plaintiffs for a receiver.

Frank J. McDougal, for plaintiffs.

Arthur Davey, for defendant.

CRAIG, J.:—The plaintiffs are judgment creditors of the defendant under a judgment recovered some years ago and still remaining unsatisfied.

The defendant has contracted with His Majesty through the Assistant Commissioner of the North-West Mounted Police here, for the supplying of hay, oats, and feed to the police force. Upon this contract he deposited about $1,500, being 5 per cent., as a guarantee fund for the fulfilling of the contract.

The plaintiffs obtained an interim order restraining the defendant from receiving the profits and the said guarantee fund until a motion was heard for the appointment of a receiver to receive the said profits arising out of the contract and the said guarantee fund when payable, to be applied upon the judgment debt, and upon that application I am now giving judgment.

The defendant was examined upon his affidavit in the case, and upon the questions affected by this motion his evidence is most peculiar, but it is the only evidence we have, and I suppose I am bound by it. It seems he borrowed the money from the bank to make his guarantee deposit, and

he is supplying the goods to the police force under some kind of an arrangement made with Breckman & Kerr of Vancouver, and although pressed by a lengthy cross-examination he cannot tell what kind of an arrangement he has with these people; neither can I from his evidence make head or tail of how he is working his contract. He does not know what he is going to get out of it. All the goods are sent in apparently by Breckman & Kerr and other suppliers, Munn being merely a sort of conduit pipe to convey them to the police force. It is very singular that a man should borrow from the bank a considerable sum of money, incur the expense of coming in from Vancouver to this Territory, which is considerable, on any such indefinite and hazy understanding as he seems to have with the suppliers of the produce. What his own profits will be I cannot tell, and he does not seem to know himself.

Upon the injunction order being served, the police had to resort to the suppliers Breckman & Kerr, to fill the orders, but apparently this was done as a sort of continuation of the old arrangement, and would not, as I judge from the evidence, affect the profits of Munn at all.

As to the appointment of a receiver in a case like this under the Rule by which receivers may be appointed when it is just and convenient for them to be so appointed, I find a little difficulty in coming to a conclusion owing to the apparent justice of the application. It may be just that a receiver should be appointed, but is it convenient? It may be just so far as the creditors are concerned, but not just so far as the police commissioner is concerned, or the parties affected by the contract made by Munn with the police force.

The case of Cadogan v. Lyric Theatre Company, [1894] 3 Ch. 338, holds that where a judgment was recovered against the theatre company, the theatre being subject to a mortgage, and the company having no land except the theatre, of which they were lessees and in occupation, and using it for the ordinary purposes of a theatre, a receiver could not be appointed at the instance of a judgment creditor to receive by way of equitable execution the moneys paid by the public for entrance to the theatre, but that a receiver could be appointed to receive the rents and profits of the property subject to the prior incumbrancer. There is also the case of Holmes v. Millage, [1893] 1 Q. B. 551, where it was held that the Court has not jurisdiction to enforce satisfaction of a judgment debt by appointing a receiver of the future earnings of a

judgment debtor. This case seems to be very much in point on the present application. In the case of McInnes v. McGaw, 30 O. R. 38, it was held that where the mother of a judgment debtor by her will empowered her executors, if in their discretion they should see fit, to pay the income of her estate in part or in whole to and for his benefit and advantage at such time and in such manner and sums as they should see fit, leaving it to their option and discretion whether they should pay him any sum, an order appointing a receiver by way of equitable execution could not stand. The Court in that case seemed to base its judgment upon the fact that the order should not be acted upon if it was intended to interfere with the action of the trustees, and that if it did not so interfere it was nugatory and perhaps embarrassing. In the case of Re Asselin and Cleghorn, 6 O. L. R. 170, 2 O. W. R. 712, it was held that the judgment creditor was not entitled to have a receiver appointed to receive all debts due to the judgment debtor, to receive and sell certain shares of stock in a foreign company said to be owned by the debtor, and to receive the interest of the debtor in a certain policy of insurance on the life of another assigned to the debtor. It was there also held that the Court will not appoint a receiver where the effect may be merely the loss of the property or right, nor will a receiver be appointed unless it is reasonably clear that benefit will be derived from the appointment. There is also the case of Slemin v. Slemin, 7 O. L. R. 67, 2 O. W. R. 1176. In that case the plaintiff's wife, who had an order for interim alimony, attempted to attach by way of equitable receivership, moneys coming to her husband as a pension under the rules of the police benefit fund. In that case the beneficiary under the rules of the Order, had to appear in person before the society, and his case had to be adjudicated upon by some board. That he had never done, and there had been no benefit or pension awarded to him under the rules of the Order, no ascertained thing being in existence.

It was contended also that there was no right to make an equitable receivership order in any case where the Crown was affected or the moneys came from the Crown. I think Stewart v. Jones, 19 P. R. 227, 1 O. L. R. 34, settles that question, the principle there being that where the debt sought to be established is one based upon a contract and recoverable as under the contract, then while the Crown cannot be affected by the procedure so as to compel it, yet a re-

ceiver may be appointed who can receive the money and give a discharge on behalf of the judgment debtor. In that case it was held that a receivership order could not stand, the money not being payable to the defendant as of right; that no petition of right would lie in respect of it; but that it was money given purely by the bounty of the Crown. The principle underlying most of these authorities is that unless there is a debt which would have been recoverable at common law, save for some obstruction in the way, and which the equitable jurisdiction of the Court could relieve from, receivership will not be granted by way of equitable execution.

In this case there is no sum which can be said to be owing by the Crown to the defendant Munn until the completion of the contract. In the manner in which he is working, as evidenced by his examination, there may never be a cent coming to him. The commissioner of police certainly cannot be examined nor made a party to this action, nor should the police force, representing His Majesty, be interfered with in the carrying out of this contract, nor should any obstruction be thrown in their way so as to make it inconvenient for them in their dealings with the party contracting. Munn, the judgment debtor, might now, and probably will, if the order is made, throw up his contract. How much or how little will be coming to him if he does so, cannot be told now, nor can this Court compel the Crown, as represented by the commissioner of police here, to give an account to ascertain that. The receiver cannot take up the contract and carry it on. That is manifestly impossible, and it is beyond the power of the Court to make any such order, for various reasons, the most patent being that the commissioner of police might refuse to deal with a receiver in any such capacity. As to the guarantee fund, that stands in the same position. How much or how little of that would be available cannot be told without that account. If that guarantee fund were presently attachable by garnishment, say, but for legal obstruction in garnishing the Crown, a receiver might be appointed to receive that fund upon the expiry of the contract, but it cannot be said that any such fund is attachable by garnishment or would be attachable by garnishment if the party contracting was a private individual and not the Crown.

I therefore think that for all these reasons the motion should be dismissed with costs, but I think these costs should be set off pro tanto against the judgment which the plaintiffs hold against the defendant, the judgment debtor.

YUKON TERRITORY.

AUGUST 22ND, 1905.

FULL COURT.

MUNROE v. MORRISON.

Courts—Yukon Territorial Court—Sittings of Court in Banc —Authority for—Court of Appeal.

Motion by defendant Hebb to vary or amend a judgment of the Court en banc.

Henry Bleecker, for defendant Hebb.

F. L. Gwillim, for plaintiff, objected that the Court did not exist as a Court en banc, and therefore could not hear this motion.

DUGAS, J.:—One of Mr. Gwillim's arguments was that the term "Court en banc" was not defined by statute, and that the laws are not framed so as to create the same legally.

This refers to the North-West Territories Act, under which was framed the Judicature Ordinance of the North-West Territories, also to the Yukon Act, under which are framed our own Ordinances, and more particularly our own Judicature Act, and amendments to all of them.

Mr. Gwillim put forth that no court of appeal can exist without statutory declaration. As to this I believe he is right, but he is mistaken when he refers to this Court as a court of appeal.

We are no more than a Court sitting en banc, which term has been long known in England and accepted in the legal language as meaning the sittings of the Judges of the King's or Queen's Bench, the Common Pleas, and the Exchequer.

"These Judges constitute the Court and exercise not only a formal jurisdiction in regulating the proceedings in suits, but also a summary jurisdiction in dealing with matters brought before them by way of motion. Such matters involve for the most part the decision of questions of law and applications for new trials, and included in the Court of Queen's Bench the direction and regulation of various criminal proceedings. The Court sitting in banc likewise decided special

cases and demurrers and regulated the practice of the Courts. Formerly sittings in banc were confined to term time, and the puisne Judges of each of the above-mentioned Courts sat by rotation in each term or otherwise as they agreed amongst themselves, so that no greater number than three of them sat at the same time in banc for the transaction of business in term." . . . etc. See "Banc," p. 474, vol. 1, Encyclopædia of the Laws of England.

The term was clearly accepted in England as referring to the bench of Judges of the above Courts, whenever used, until the Judicature Act was passed in 1873, by which the business of the Court in banc was transferred by sec. 41 to the Divisional Courts of the High Court of Justice established under that Act, and these Courts as now constituted consist of two Judges or of such additional number as the President of the Division may think expedient.

The Court in banc, as well as the Divisional Court, which replaced it, had an appellate jurisdiction, which for the first was established by custom and for the second has been fixed by statutory enactment. See "Supreme Court," vol. 12, Encyclopædia of the Laws of England.

The Court in banc was composed of three Judges; the Divisional Court may be constituted of two Judges, or of more than two, as stated above.

Its business is original and appellate, and sitting as the Queen's Bench, now the King's Bench Division, it may transact such business as would formerly have been heard in banc in the Queen's Bench, Common Pleas, and Exchequer.

See "Appeal," vol. 1, Encyclopædia of the Laws of England, p. 277.

The term Court in banc has, therefore, been of such a usage for generations that there cannot possibly be any ignorance of or misunderstanding as to the meaning of the law in simply referring to it.

There was a time, that is when there was only one Judge, in this Territory, that this Court could not have sat as a Court in banc proper, for it stands to reason that the same Judge could not sit in revision of his own judgments, although under the North-West Territories Act, which was in force in this Territory, such a Court might have existed as soon as there were sufficient Judges to form what is termed a Bench of justice and therefore a Court in banc.

It was only after the three Judges had been appointed that it may be said that the Court in banc regularly existed as complying with the conditions that existed in England before the Judicature Act, and which required three Judges and no more to constitute a Court in banc.

Before the appointment of the three Judges, it is true that a statute had been passed, ch. 11, sec. 7, of 1899, constituting the Supreme Court of British Columbia a court of appeal for this Territory, which statute was afterwards repealed by ch. 35, secs. 3 and 4, of 1902, and by which it was declared that appeals from the Territorial Court would lie to the Supreme Court of Canada, where the matter in controversy amounts to the sum of $2,000 and upwards, etc.

It is pretended that the statute creating the British Columbia Supreme Court, as a court of appeal, direct from the judgments of the Territorial Court, having been passed, the right of appeal before this Court in banc was abolished and that the repeal thereof did not revive it.

These pretensions would be right if the Court in banc was really existing by statute as an appellate Court, but as it does not and is purely a term used, as I said before, to designate a bench of justice, or the Judges of the Court taken together, the passing of those statutes did not have this pretended effect.

The Territorial Court continued to exist, and the members thereof in sitting together formed the Court in banc as soon as they were a sufficient number to be so called.

Section 6 of the Yukon Territory Act declares that the "Commissioner in Council shall, subject to the provisions of any Ordinance of the Governor in Council, have the same powers to make Ordinances for the government of the Territory as are at the date of this Act possessed by the Lieutenant-Governor of the North-West Territories, acting by and with the advice and consent of the Legislative Assembly thereof, to make Ordinances for the government of the North-West Territories: Provided that the Commissioner in Council may, subject as aforesaid, notwithstanding anything to the contrary in any Act of Parliament, make Ordinances for the control and regulation of the sale of and traffic in intoxicating liquors in the Territory."

Sub-section 10 of sec. 13 of the North-West Territories Act declares that the administration of justice in the Territories, including the constitution, organization, and mainten-

ance of Territorial Courts of civil jurisdiction, including proceedings therein, is given to the Legislative Assembly of that Territory.

This Legislative Assembly, as well as the Commissioner in Council of the Yukon Territory, had all powers to make any legislation concerning the administration of justice and the constitution, organization, and maintenance of Territorial Courts of civil jurisdiction, which includes the right to give jurisdiction to the Court in banc, as is given in our Judicature Act by secs. 506 to 524.

Section 509, as amended, declares "that an appeal shall lie to the Territorial Court in banc from any final or interlocutory judgment, order of the Court or a Judge, where the matter in controversy amounts to the sum or value of $200 or upwards," etc.

By another statutory enactment since passed there is an appeal to the Supreme Court of Canada from the judgments of the Court in banc sitting under this section, where the amount in litigation is $2,000 or upwards, etc.

I cannot, therefore, with this exposition of the different statutes which concern us, see any possible plausibility in the objection which has been raised.

With all this, should any doubt still exist, I think that secs. 5 and 6 of ch. 35 of 1902, would strongly contribute to dispel the same, for there again this federal enactment declares that the "Territorial Court in banc shall sit at such times and places as the Commissioner appoints" . . . and sec. 6: "at such sittings the Court may hear and dispose of motions for new trials, appeals, and motions in the nature of appeals, and any other business or matter within the jurisdiction of the Territorial Court." And later on, ch. 74 of 1903, declaring that "two Judges shall constitute a quorum of the Territorial Court in banc, with the proviso that where there are two Judges sitting upon an appeal, the trial Judge or the Judge from whose decision the appeal is taken, shall not be one of them," is another refutation of Mr. Gwillim's argument.

Upon the whole I believe that Mr. Gwillim's objections to our legal existence are not sustainable.

CRAIG, J., gave reasons in writing for the same conclusion.

MACAULAY, J., also concurred.

YUKON TERRITORY.

CRAIG, J. AUGUST 26TH, 1905.

CHAMBERS.

RE YUKON DOMINION ELECTION.

GRANT v. THOMPSON.

Evidence — Hearing of Preliminary Objections to Election Petition—Leave to Supply New Evidence after Hearing Concluded — Proof of Status of Petitioner — Production of Voters' List.

Motion by respondent to dismiss the petition on preliminary objections.

George Black, for respondent.

F. J. McDougal, for petitioner.

CRAIG, J.:—On a motion to dismiss the petition on preliminary objections, one of the objections taken, among many others, was that the petitioner is not a person who has a right to vote at the election to which the said petition relates. The matter was fully argued as to the validity of that objection. The only material filed of proof of the status of the petitioner was an affidavit attached to the petition in which the petitioner swears that he is the petitioner and that he has read over the petition and has good reason to believe and verily does believe the several allegations contained in the petition, one of the allegations being that he was entitled to vote and did vote at the election. Counsel for the petitioner relied upon that as being sufficient proof of status, offered no other evidence, asked for no adjournment to prove the status beyond that affidavit. Counsel for the respondent cited some cases which seemed to surprise counsel for the petitioner, and two days after the argument was closed, without any application whatever to put in further evidence upon that point, verbal application was made to me to hear a motion to admit evidence of the status of the petitioner. I directed the solicitor for the petitioner to move in the usual manner. At the argument I allowed counsel two additional days to give me any further authorities they might find upon the points raised, not, as stated by counsel, upon the motion to open up to put in further material. That was not what I gave the two days for. It was, as is commonly done, to get further authorities

to aid the Court in coming to a conclusion upon the law. The motion came on to admit further evidence, and the only material filed upon that motion was an affidavit of petitioner's counsel that on preparing for argument on the preliminary objections he sought and looked for Pierre Ledieu, the Returning Officer, for the purpose of finding out if he had the voters' lists; that it was his intention to give the evidence required, but that Pierre Ledieu was not to be found; that no list is available in Dawson; that it is necessary to send to the Clerk of the Crown in Chancery for a certified copy of the list; that on failing to find Pierre Ledieu, the Returning Officer, he did not press the matter nor make application upon the argument because he depended upon a certain English case cited upon the argument; and that it will be a great hardship if he is not allowed to prove his status at the present time.

In the petition corrupt practices are alleged. But upon the question of whether I should now admit this evidence I am in considerable doubt. I do not think it can be argued very strongly that the petitioner was surprised, because he knew he had to give some proof of status and was satisfied with the proof which he put in. That he was surprised by the law cited may or may not be so. On that he says nothing. I presume the Rule under which the application is made, although not so stated, is Rule 257 of our Ordinances, which is as follows: "Where through accident or mistake or any other cause a party omits or fails to prove some fact material to his case, the Judge may proceed with the trial subject to such fact being afterwards proved, at such time and subject to such terms and conditions as to costs and otherwise as the Judge directs," etc. The question is: Shall I or shall I not exercise the discretion which I have, in favour of the application to receive the new evidence? The Judicature Act of Ontario contains a precisely similar Rule, but there are very few cases reported under it which I can find. In the case of Heath v. Pugh, 6 Q. B. D., it was held that a party abstaining from proof under the idea that his adversary had no real intention of putting in such proof and being thereby taken by surprise, has no ground for a new trial. In the case of Bigsby v. Dickenson, 4 Ch. D. 24, it was held that the Judge may, if he thinks right, at any stage of the trial, where a party is taken by surprise, allow him to produce rebutting testimony, and if such permission is refused the Court of Appeal

will in a proper case permit further evidence to be adduced on appeal. That was a case where the plaintiff sought for the abatement of a nuisance, and the defendant defended by asserting that the plaintiff's own works caused the nuisance, and evidence was given that a certain mineral asphaltum which the plaintiff used in the works gave out a noxious vapour, and the defendant asked leave to prove that the asphaltum which he used was a gum and not a mineral asphalt which would cause a nuisance. He was refused the right to produce the evidence. The Vice-Chancellor thought it was too late and he was precluded. The Court of Appeal held that he ought to have had the opportunity he asked and that "it was not evidence of something which could have been invented or fabricated during counsel's speech to meet the pinch of the case. The main fact sought to be proved was, if true, known to all the persons in London connected with the trade, namely, that there was such a thing as vegetable asphaltum." Bagallay, J.A., said: "It appears to me that this is exactly a case in which it was, I will not say the duty, but the right, of the Court to require that a further witness or further witnesses should be called." In the case of Dean v. Ontario Cotton Mills Co., 14 O. R. 124, an action brought against a master for injuries to servants or employees, it appeared at the trial that the defendant relied upon the Ontario Fisheries Act of 1884, but omitted to prove the proclamation bringing that Act into force at the trial, and without the assistance of that Act he must have failed. The Court allowed him to afterwards prove the proclamation. Armour, J., in giving judgment, said: "If the Act was in force at the time of the injury complained of, we ought not to deprive the plaintiff of the benefit of its provisions, but ought to allow him to obtain the benefit of them on some terms." The case of Burfoot v. Dumoulin, 21 O. R. 583, a decision on this very Rule, is a case in which permission was given to prove a registration which was neglected to be proved at the trial by inadvertence, and in that case reference was made to Peterkin v. McFarlane, 9 A. R. 429, where Hagarty, C.J., in giving judgment used these words: "I think I am allowed and required by law to give judgment according to the very right and justice of the case, and up to the last moment we have the right to make any amendment proper for the attainment of that very desirable end;" the idea seemingly being that where the facts sought to be given in evidence could not be altered or manufactured in the mean-

time, and that the evidence was not by way of bolstering up a case, or could not by reasonable precaution have been obtained before, or where it was a necessary fact to be proved on the issue, the Court ought to exercise a discretion in favour of having the full case before the Court. In the case of Hamilton v. Broatch, 17 O. R. 679, the same principle is given effect to. Rose, J., in his judgment says: "I do not think the plaintiffs' case should be wrecked if their contention should be upheld, for there is no doubt that the certified copy put before the Court the exact statement of fact, and if for any purpose the original should be referred to, the plaintiffs ought, in my opinion, at any stage to be allowed to produce it for the inspection of the Court. No injustice can possibly be done to the defendant from the acceptance of a certified copy, and if the merits are not with him technicalities must not be allowed to defeat justice." And in the case of Saunders v. Saunders, which is perhaps the strongest case on this point which I have found, reported in 19 Ch. D. 373, Jessel, M.R., said: "The appellant has applied for leave to adduce fresh evidence, but I am of opinion that it should not be granted. The application is for an indulgence. He might have adduced the evidence in the Court below. That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in Court. The exact point on which evidence is wanted having been thus discovered, to allow fresh evidence to be introduced at that stage would offer strong temptation to perjury. Moreover, speaking for myself, I think when an application is made for an indulgence, the moral elements of the case ought to be taken into consideration. I am more inclined to grant it when what appears to be a substantially good and honest case is in danger of being defeated on technical grounds, than in favour of an attempt to defeat a good case on technical grounds." The last words of this quotation seem to me to meet the case before me, and are helpful in enabling me to arrive at a decision. The plaintiff does not seek to adduce any evidence of his own which is oral, and which he might manufacture to meet the exigency of the case. All he seeks to do is to produce a public document now in existence which cannot be altered or affected in any way. It is evidence now existing, and, if true, ought to have been before the Court. While it

may be called bolstering up a case, still it is not that in a strict acceptance of that expression. It is simply supplying the missing link which enables the Court to fully adjudicate upon the question raised by the parties, and the danger which Jessel, M.R., seemed to fear in granting such an application would not arise in this case.

I do not think that the plaintiff can succeed under the Rule upon the ground of accident or mistake. What the "other cause" covered by the Rule is, is hard to say, but I think, in the light of the authorities which I have cited, the "other cause" would be the complete trial of the action, with full knowledge of the facts being before the Court. Neither counsel for the petitioner nor for the respondent gave me any authority upon this matter; a simple request with very little material on the one side and an argument as to the injustice of allowing the motion now upon the other. There is no injustice done at all in allowing the evidence to go in. It is perhaps introducing a dangerous precedent and one which should be guarded carefully along the lines which I have laid down and based upon the authorities, that a party should not be allowed to close his case and after finding out some weak spot in it, be enabled to bolster it up by oral testimony. That I would not allow, but this, it seems to me, is entirely different, upon the grounds which I have laid down already, that the evidence is now existing and cannot be altered or changed by the party wishing to introduce it. More than that, this is a case of public moment. The petitioner has seen fit to deposit the necessary sum in Court guaranteeing his good faith in petitioning against the election. He petitions on grounds which, if established, justify me in allowing the petition; and if he can prove his charges the public interests warrant me in allowed him to prove them. I need not enlarge upon this point; that must be apparent to every one. What terms I should impose is another matter, but I think that the petitioner must pay the costs of this motion forthwith before obtaining the benefit of the leave which I have given him, and the costs will be fixed at $30 to cover all the respondent's costs of the motion. He will also have the material which he proposes to introduce in evidence mailed to the Clerk of this Court, sealed and not to be opened until used before me on the further argument of this case. Upon these terms being complied with and such material being here within 20 days, he will be allowed to introduce the further evidence.

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MANITOBA.

RICHARDS, J. SEPTEMBER 11TH, 1905.

TRIAL.

REX v. RURAL MUNICIPALITY OF PORTAGE LA PRAIRIE.

Nuisance—Highway — Non-repair — Indictment — Abatement—Costs.

In the autumn of 1903 the defendant municipality were, under proceedings by indictment, found guilty of allowing to remain out of repair a highway lying south of section 3 in township 14, range 7 west of the principal meridian, which highway it was the duty of the municipality to keep in repair.

The trial Judge ordered the nuisance to be abated by 31st July, 1904, at the cost of the municipality.

The municipality neglected to obey the order, and at the autumn assizes in 1904 counsel for the Crown, acting also for David Love, at whose instance the prosecution had been had, moved for an order directing the sheriff to repair the highway. No sufficient ground for the delay on the part of the municipality was shewn. But, as nothing could be done to repair the highway, until after the then approaching winter, the giving of judgment on the motion was allowed to stand.

F. G. Taylor, for the Crown.

RICHARDS, J.:—The municipality have, as I am informed by counsel who made the motion, repaired the road, so that only the question of costs remains to be dealt with.

I am of opinion that the motion was properly made, and that, but for the subsequent action of the municipality, the order should be made as asked for, and a writ de nocumento amovendo issued to the sheriff.

I, therefore, order the municipality to pay the costs of the motion at once after taxation thereof.

MANITOBA.

RICHARDS, J. SEPTEMBER 11TH, 1905.

TRIAL.

DAY v. CROWN GRAIN CO. AND CLEVELAND.

HUDSON v. CROWN GRAIN CO. AND CLEVELAND.

WRIGHT v. CROWN GRAIN CO. AND CLEVELAND.

WOODWARD v. CROWN GRAIN CO. AND CLEVELAND.

Mechanics' Liens—Time for Registration of Lien—Completion of Work—Extent of Lien—Judgment—Reference—Costs.

The plaintiffs in the first three cases did work and supplied materials as sub-contractors under defendant Cleveland, who had contracted with defendants the Crown Grain Company for the erection and equipment of an elevator.

Plaintiff Woodward supplied materials to Cleveland for use in such erection, which were used therein. In each case the plaintiff, or plaintiffs, registered a lien against the Crown Grain Company's property, upon which the elevator was erected, to recover the contract price, or cost of materials, or the unpaid portion thereof.

The substantial defence in the Day case was that the plaintiff was alleged to have completed his contract in full, and to have, thereafter, delayed more than 30 days before registering his lien, and that, for that reason, his lien was not a charge upon the land.

C. H. Campbell, K.C., A.-G., and A. E. Hoskin, for plaintiff Day.

H. W. H. Knott, for plaintiff Hudson.

E. L. Taylor, for plaintiff Wright.

T. R. Ferguson, for plaintiff Woodward.

F. H. Phippen and G. D. Minty, for defendants.

RICHARDS, J.:—With some hesitation, I think that plaintiff Day never wholly completed his work, but that it was understood between his agents and Cleveland, or his agents, that the work was not finished, and that, when the rest of the elevator should be so far finished as to allow the machinery put in by plaintiff to be tested, his workmen would have to go back and test and complete the dust collecting system, which his sub-contract provided for the installation of, by him.

When plaintiff's workmen did return, and attempt to complete, they were prevented by the company from so doing.

There will be judgment for plaintiff against Cleveland for the unpaid balance of $2,020, with interest at 5 per cent. from the date of the registration of plaintiff's lien, and with costs, and declaring plaintiff to have a charge for such moneys, interest, and costs, upon the land.

In the Hudson case there will be a similar judgment for $187.50, with interest at 5 per cent. from the date of registration of the lien, and with costs.

In the Wright case there will be a similar judgment for $256.50, with interest at 5 per cent. from the date of registration of the lien, and with costs.

I am of opinion that in the Woodward case the materials were supplied prior to 30 days before the registration of the lien. The action will, therefore, be dismissed as against the Crown Grain Company with costs.

There will be a reference to the Master to take an account of the amount which, under the provisions of the Mechanics' and Wage Earners' Lien Act, should be available, in the hands of the Crown Grain Co. for payment of such liens as are valid charges upon the land, and an account of the still unpaid part of the moneys payable by the company to Cleveland for the erection of the elevator, and an account of the existing claims of lien-holders which are a charge upon the land, and to settle, as between themselves, the rights and priorities of

such lien holders, and to report any special facts or circumstances.

In the Day case there is also to be taxed as part of the costs, a counsel fee to Mr. Potts, who, by my direction, represented at the trial those lien claimants whose interests were adverse to the Day claim, such counsel fee to be a lien in the same manner as the other costs.

MANITOBA.

RICHARDS, J. SEPTEMBER 11TH, 1905.

TRIAL.

NOBLE v. RURAL MUNICIPALITY OF TURTLE MOUNTAIN.

Nuisance—Highway—Non-repair—Remedy — Special Damage to Land Owner — Action — Claim for Damages — Claim for Mandamus—Remedy by Indictment—Costs.

Plaintiff, in 1899, bought the north half of section 32 in township 3, range 16 west of the principal meridian in Manitoba, and had owned it ever since. Since 1900 he had resided on the land and farmed it.

A small river ran through the half section from north-east to south-west. It crossed the road allowance or highway north of the half section, a short distance west of plaintiff's easterly limit. Its banks were too steep to allow the stream to be crossed for farming purposes. The above road allowance used to cross the river by a bridge built a number of years before 1899. Plaintiff was able to get from his land on one side of the river to that on the other side by driving north to the road allowance and crossing the bridge, and then turning south.

Work was, at various times prior to 1902, done by the municipality on the bridge, and on other adjoining portions of the highway of which it so formed part.

In the spring of 1902 the bridge was carried away by a heavy freshet. It had not been replaced in spite of plaintiff's requests therefor to the council. Since it was carried away the plaintiff had been compelled, in order to get from

his land on one side of the river to that on the other side, to drive several miles further than he had to go for that purpose while the bridge existed.

In this action plaintiff asked that defendants be ordered to repair or rebuild the bridge, and claimed damages for loss by reason of the neglect to repair.

H. M. Howell, K.C., and D. A. Macdonald, for plaintiff.

J. A. M. Aikins, K.C., and H. A. Robson, for defendants.

RICHARDS, J.:—I think the bridge was part of the highway, and that defendants were and are under an obligation to repair. But, while the Court has the power to act by mandamus, it will not do so unless there is no other adequate remedy.

If there is another sufficient remedy, the rule is, not to act by mandamus merely because the proceedings to enforce that other form of relief may be less convenient to the applicant than a mandamus would be.

Plaintiff should, in the present case, have proceeded by indictment, which has frequently been held to be the proper course for such a case. This refusal of the mandamus is to be wholly without prejudice to his right to so proceed.

I think, however, that plaintiff's claim for damages is well founded.

In Iveson v. Moore, 1 Ld. Raym. 495, the plaintiff owned and worked a colliery. The defendant obstructed the public highway over which the plaintiff and his customers used to haul coals from the colliery. As a result the plaintiff and his customers were driven to take a longer route, which caused the plaintiff expense and loss, and his business suffered damage. It was held that, as the injury so suffered was one to his business as a collier, he had suffered special damage, and his action lay, notwithstanding that the defendant's obstructions to the highway had created a public nuisance, which might be dealt with by indictment; see the foot notes to the case in the above report. That case is cited as an authority in Winterbottom v. Derby, L. R. 2 Ex. 316, and in later cases. Following Iveson v. Moore, I think plaintiff's damage, in connection with the working of his farm, is special and apart from the inconvenience that he, in common with the general public, has been put to, in being hindered from using the highway for ordinary purposes.

Section 607 of the Municipal Act says, that the municipality in default shall "be civilly responsible for all damages sustained by any person by reason of such default." These words do seem to me to be sufficiently wide to cover the present case.

The notice of plaintiff's claim, as required by sub-sec. (*b*) of sec. 667, was served on 2nd December, 1903. With some hesitation, I am of opinion that the sub-section limits plaintiff's claim to damages suffered since one month prior to the service of the notice—that is, since 2nd November, 1903.

The action being in respect of a continuing cause of action, I have assessed the damages under Rule 566 of the King's Bench Act from 2nd November, 1903, up to the date of giving this judgment, at $300, for which there will be judgment in plaintiff's favour.

Even if defendants had rebuilt the bridge at once after action brought, and the damages had, as a result, been allowed at a smaller sum, proportioned to the shorter period of default, this Court would still, in my opinion, have been the proper one in which to bring the action. Plaintiff is, therefore, to get his costs of a King's Bench action.

The defendants are not to be allowed any costs in connection with the disallowed claim for a mandamus, or otherwise.

MANITOBA.

RICHARDS, J. SEPTEMBER 11TH, 1905.

TRIAL.

GARDINER v. BICKLEY AND BENNETT.

Fraud and Misrepresentation—Sale of Shares—Misrepresentations as to value — Damages — Reconveyance of Land Conveyed as Part of Consideration — Ratification—Election — Liability of Principal for Misrepresentations of Agent—Costs.

Plaintiff, a real estate agent, and defendants, both physicians, all resided at Waterloo, Iowa.

On 6th January, 1904, the parties entered into an agreement whereby Bickley and Bennett were to sell and transfer

to Gardiner all the shares of stock they owned in the county telephone and telegraph system, also the stock they owned in the Cedar Valley Telephone Company, the Waverley, Parkersburg, Hardin County, Buchanan County, and Oelwein Telephone Company. In consideration of the property sold, Gardiner was to pay to Bickley $17,916.66, and he was to assign to Bickley and Bennett 250 shares of the capital stock of the United States Telephone and Telegraph Company, of the value of $100 each. Gardiner was also to convey to Bickley and Bennett several sections of land in Assiniboia; also part of lot 3 in the parish of Kildonan, containing 28 acres. Gardiner alleged that Bickley and Bennett induced him to enter into the agreement by representing to him that the stock in the telephone companies was worth at least $150,000 over and above all debts and liens, and that it would yield a net annual income of at least $30,000. Relying upon the representations made to him, Gardiner took over the stock and conveyed to Bickley and Bennett the land in Kildonan and other property, but alleged that he subsequently found out that the stock in the telephone companies was not worth what it was represented to be, and the income was not sufficient to pay the annual expenditure; that by reason of defendants' misrepresentation he had suffered damages to the extent of $210,000, and had, in fact, received no value for the conveyance of lands to defendants.

Plaintiff claimed damages and asked for a lien on the land in Kildonan for the sum of $150,000.

Defendants asserted that plaintiff, before he entered into the agreement, caused an independent investigation to be made on his behalf into the matters relating to the companies, and with full knowledge entered into the agreement; that after the transfer of the shares he had been selling and dealing with them, and could not be heard to complain, as he had ratified the agreement by his dealings, and they claimed damages from plaintiff as they could not subdivide and sell the Kildonan property in consequence of the lis pendens he had registered against the same.

G. A. Stewart Potts and H. Ormond, for plaintiff.

F. H. Phippen and G. D. Minty, for defendants.

RICHARDS, J.:—Before the transactions in question plaintiff had been a farmer and cattle dealer, and then for a short time had dealt in real estate. In the latter capacity he had

made large sums in a short time, as the result of continued advances in land values. He has not much education and is greedy of money. His mind seemed to be slow moving, but very tenacious of ideas when acquired.

The defendants were the holders of almost all the stock in an independent telephone system operated in the neighbourhood of Waterloo, Iowa, where they and the plaintiff lived.

Defendant Bennett was the originator and manager of the system. He had become conversant with the working, financial needs, and difficulties of such systems. Owing to opposition from the Bell Telephone Company, or companies, and perhaps other causes, it was, as Bennett knew, practically impossible to float bonds of an independent telephone system.

Bennett, who conducted for himself and Bickley the negotiations in question, is a man of unusually keen and subtle intelligence, very active minded and plausible, and apparently very persistent. The system had been developed from local centres. It had been possible, at first, to get local capital, in small amounts, as the business was extended. But the system had grown too large to be operated profitably if it stood still. It could not be developed further without establishing trunk lines and incurring expenditure greatly in excess of what could be met out of local contributions of capital. It had reached a stage where it had to either get a large sum from bonds and build trunk lines, etc., or retrograde and become a failure.

Bennett had tried, in different ways, to get the necessary capital for such purposes, but had failed. The system was getting into difficulties and owed large sums to supply companies and others. Its need of money was immediate and serious. As collateral to its debt to a bank, it had given an unregistered conveyance of its property.

At this stage the plaintiff and a Mr. Elliott came into contact with Bennett, and a number of negotiations and transactions took place, which it is impossible to now deal with in detail.

As a result, the plaintiff and Elliott agreed to purchase a half interest in defendants' holdings in the system. Elliott transferred his interest to plaintiff, and, later, plaintiff purchased all of defendants' holdings.

As part of the consideration agreed to be given by plaintiff, he transferred to defendants part of lot 3, D. G. S., in Kildonan parish in Manitoba.

Plaintiff knew nothing of the promoting of stock companies, or of the floating of bonds, or stocks, or of the management, handling, or operating of telephone systems, and had had no financial or business training. His mind seems to be open to single ideas only, and to be dominated by such ideas, to which he apparently clings tenaciously.

The ease with which he had suddenly made large sums from land dealings appears to have made him think himself a capable financier. That made him susceptible to flattery, and an unusually easy mark for a schemer.

I find that he was induced to purchase by representations of Bennett, that defendants' holdings were worth $150,000, and upwards; that the system earned a net annual income of $30,000: that the plant of the system was in good condition; and that a new company, to be formed to take over and operate the property, could readily raise, by a bond issue, capital for building trunk lines and for other necessary expenditure.

I further find that Bennett knew these representations were untrue, and that he made them fraudulently to induce plaintiff to purchase, and that he knew that, unless bonds could be sold in large quantities, the stock was worthless and the system would break down for want of money.

If the representations had been truthful, the defendants would patently have been foolish to make the bargains that they did with plaintiff. A good business man in plaintiff's place ought to have had his suspicions aroused. But Bennett represented that it was of value to the system to get a man of plaintiff's business standing interested as a shareholder, and plaintiff's swollen ideas of his own importance caused him to believe it.

The system was a losing business from the time plaintiff became interested, and, I think, had been such for a considerable time before. He did not, and could not, handle it as economically as Bennett had.

But there was nothing in his management, or rather that of his employees, that would account for the changing of a net income of $30,000 into a continuing deficit.

The plaintiff, at different times and in different ways, received what, to a man of fair intelligence, would be grounds to suspect that the system, values, profits, etc., and the prospect of floating bonds, were not as had been represented. But he went on, believing Bennett's representations, and com-

pleted his purchase. To realize that he continued so to believe, his disposition and his abnormal tenacity of an idea, when once acquired, has to be carefully kept in mind. Any tendency on his part to suspect, appears to have been easily lulled by Bennett's plausibility. It was not till he found out that Bennett himself thought the stock of no value, and until he had time to consider that fact in his dull way, that his mind grasped the situation. After that he did not, in my opinion, elect to ratify.

While still believing the representations, plaintiff expended large sums for the benefit of the system, which moneys are a total loss. The system has been sold, or foreclosed, by its creditors, under court process in Iowa.

There will be judgment that the conveyance of the Kildonan land was obtained by fraud, and ordering its reconveyance, and that plaintiff is entitled to damages in respect of his loss resulting from the fraudulent representations.

There will be a reference to the Master to settle the reconveyance of the land and to ascertain the particulars and amount of the damages to which plaintiff is entitled, with power to report special facts and circumstances and any other matter that he may think advisable to report.

With great reluctance, I have concluded that, following Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259, I must hold defendant Bickley liable for Bennett's misrepresentations, which were made in the course of the latter's agency. I should have liked to be able to confine Beckley's liability to the extent to which he actually profited by the transactions.

On his examination for discovery, plaintiff professed to be unable to remember very many things which, on the trial, he purported to remember distinctly. I do not believe that the discrepancy was due to temporary loss of memory, but am impelled to the belief that on one or the other occasion he was untruthful. In forming my conclusions I have, therefore, placed no reliance on his evidence. For that reason, also, I do not allow him costs as against Bickley. But, as I also put no faith in Bennett's testimony, I think the plaintiff should have costs against him. Further directions and the costs thereof and of the reference are reserved.

MANITOBA.

MATHERS, J. SEPTEMBER 26TH, 1905.

CHAMBERS.

BROWN v. CANADA PORT HURON CO.

Costs—Trover for Goods Converted — Return of Goods after Action Begun—Dispute as to Identity of Goods—Motion to Dismiss Action.

Action of trover for the conversion of a portable threshing engine.

After the action had been commenced, defendants shipped to plaintiffs at Portage la Prairie, where they resided, and carried on business, an engine, which defendants alleged to be the one in question. Plaintiffs denied that the engine so shipped was their engine, but asserted that if it was their engine it was of very much less value than when converted by defendants.

Defendants then moved for an order dismissing plaintiffs' action with costs, or upon payment of costs to date, or staying proceedings upon the return by defendants to plaintiffs of the engine in question, and authorizing defendants to return the same upon payment of the costs to date; or for an order authorizing defendants to return the engine, and directing that in the event of plaintiffs proceeding to trial and not recovering damages beyond nominal damages, that plaintiffs pay the costs of the action.

A. E. Hoskin, for defendants.

T. M. Daly, K.C., for plaintiffs.

MATHERS, J.:—The authority for a motion of this kind is well established by such cases as Philips v. Hayward, 3 Dowl. 362; Peacock v. Nichols, 8 Dowl. 367; Hiort v. London and North Western R. W. Co., 4 Ex. D. 188; Earle v. Holderness, 4 Bing. 462. In all the cases to which I have been referred there was no controversy as to the identity of the goods in question. Here plaintiffs deny that the engine tendered is their engine, but I do not think that this precludes me from making an order. I cannot make any finding as to the identity of the engine that would be binding upon plaintiffs.

The question of whether or not the engine shipped by defendants to Portage la Prairie for plaintiffs is plaintiffs' engine must be left an open question to be determined by the Court at the trial.

Defendants should, however, be permitted to return the engine for which trover is brought upon paying the costs of suit to date, including the costs of this motion, and if plaintiffs proceed to trial, and do not recover damages beyond nominal damages, plaintiffs should pay the costs subsequent to this order, and I will make an order accordingly. Should defendants not return the engine and pay the costs within 2 weeks, the motion should be dismissed, with costs in the cause to plaintiffs in any event.

BRITISH COLUMBIA.

(VANCOUVER.)

DUFF, J. MAY, 1905.

TRIAL.

SAYERS v. BRITISH COLUMBIA ELECTRIC R. W. CO.

Railway—Injury to Passenger—Action — Limitation Clause —"By Reason of the Railway"—"Works or Operations of the Company."

Plaintiff was injured on defendants' tramway in Vancouver, in stepping off a movable platform provided by defendants for the accommodation of passengers transferring at one of the junctions. The platform was necessary to enable passengers to alight, owing to the height of the car steps above the surface of the street. The platform was so placed that there was very close to it, and not easily observable by passengers leaving the car, a large hole, into which plaintiff stepped, severely injuring her knee. She brought this action to recover damages for her injuries.

D. G. Macdonell and W. C. Brown, for plaintiff.

Joseph Martin, K.C., for defendants.

DUFF, J.:—I will now give my opinion upon the defence pleaded in paragraph 13 of the statement of defence. The defendants rely upon sec. 60 of their incorporation Act, ch. 55 of the statutes of 1896, which is as follows:

"All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within 6 months next after the time when such supposed damage is sustained, or if there is continuance of damage, within 6 months next after the doing or committing of such damage ceases, and not afterwards, and the defendants may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance thereof and by authority of this Act."

It is contended that the effect of this section is to impose upon any person having a complaint against defendants for damages caused by reason of the failure of the company to perform its contractual obligations to exercise due care in the carriage of passengers, a prescription of 6 months in respect of such complaint. Apart from the phrase "works or operations of the company," the section (except as to the duration of the prescription) is identical with sec. 42 of the British Columbia Railway Act, and with the section providing the corresponding limitation in the Railway Act of Canada as it existed prior to the recent consolidation.

Now, the last mentioned section has not infrequently been the subject of judicial consideration; and one rule for the construction of that section has been laid down in Ontario which, I think, is a sound rule. It was enunciated by the Common Pleas Division in Anderson v. Canadian Pacific R. W. Co., 17 O. R. 747, in the following terms:—"In the present case the defendants had entered into a contract with the plaintiff to carry her baggage safely as common carriers, and it was their duty to see that the railway was in a proper state. In the case cited the defendants were under no obligation to the plaintiff apart from the public generally, and the clause in question has reference only to such an obligation, not to any special contract." The case went to the Ontario Court of Appeal, and two of the members of the Court of Appeal (17 A. R. 480) expressed concurrence with the view taken by the Common Pleas Division, the other two members of that Court holding the opinion that the section

in question was ultra vires of the Dominion Parliament, and therefore of course not enforceable as against the plaintiff; but, so far as I can see from the report, no dissent was expressed from the view embodied in the language I have quoted.

Now, does that case supply the rule of construction to be applied here, notwithstanding the presence of the phrase "works and operations of the company" in the clause we are considering? In my opinion it does. Of course, that is a comprehensive phrase, and it is capable of being read as comprehending any act of the company giving rise to a cause of action for damages; but when one considers the very large powers which the legislature has conferred upon the company, it becomes apparent that some restriction must be placed upon it. I pass without observation the fact that no territorial limitation, except the boundaries of the province, is placed upon the power of the company to construct and operate electric railways and tramways, and to generate and distribute light, heat, and power by means of electricity. The company by sec. 37 have power to make traffic agreements with other carriers for the carriage of freight and passengers; to enter into agreements with municipalities for the construction and repair of highways; and to act as guarantors for other companies having powers similar to their own. They have power to enter into agreements with other companies for leasing or selling to them any of the property of the consolidated company and for granting running powers over the company's lines; and to enter into contracts to build and equip railways and to light streets in any municipality; and to supply power and heat in the province generally.

If this section is to receive the construction which defendants put forward—then consider the consequences as they affect the classes of persons with which, under these powers, the company may deal. Take, for example, the case of a stage line, or an express company, having traffic arrangements with this company. The contention of the defendants is that the carrying out of such traffic arrangements would be an operation of the company within the meaning of the section. Is it to be supposed that the legislature intended to place this prescription upon a cause of action arising under an agreement of that kind by reason of the failure of the consolidated company to exercise due care in carrying out the agreement?

Again, take the case of an agreement with the municipality with regard to the grading of streets; an arrangement with a municipality to lease the plant and rolling stock of a municipal tramway and operate it for a period of years; and damage arising from the careless operation or repair of the tramway such as would give the municipality a right of action—is it reasonable to suppose that the legislature intended this company in such cases to have the protection of this limitation? Or take a case arising from the exercise of the power conferred by sec. 53, which reads as follows:—"The company shall have power to enter into contracts with any person or persons, corporation or corporations, and with any municipality in the said province, for building and equipping street railways and for lighting the streets of any municipality and supplying it or them with power and heat, and any such contract shall be valid and binding, for the term of years thereby agreed upon, on the company and any such person or persons or any municipality, corporation, or corporations so contracted with." Or the ordinary case of an agreement with a theatre proprietor to supply electric light, or with a manufacturer to supply power; and injury to the plant of the theatre or manufactory owing to the company's negligence at some critical time—does it seem reasonable that the legislature intended in any of these cases that this company should be exempted from the usual forensic rules which apply to all other subjects invoking the aid of the Courts of this province.

I think that the method of interpretation which one ought to apply to a statute of this kind is supplied by the canon of construction which was laid down by the Chief Justice of Canada in the case of Ste. Hyacinthe Gas Co. v. Ste. Hyacinthe Horse Power Co., 25 S. C. R. 168, at pp. 173-4. The Chief Justice there said:—"The Courts take notice that these Acts are obtained on the petition of the promoters, and in construing them treat them as contracts between the applicants for them and the legislature on behalf of the public, and the language in which they are expressed is treated as the language of the promoters, and the maxim verba fortius accipiuntur contra proferentem is applied to them; and the benefit of any ambiguity or doubt is given to those whose interests would be prejudicially affected, especially when such persons are not parties to the Act, nor before the legislature as assenting to it. And particularly is this so where exorbitant powers, such as monopoly, are conferred."

The language that I have quoted points to this, that you are to look to the class of persons whose interests were before the legislature at the time it was considering the statute, and you are not to extend the enactments so as to make them apply to interests which were not then in the eye of the legislature.

Now, it is obvious enough that the interests of any individual who, as a member of the public generally, would be prejudicially affected by the wrongful acts of this company, were within the contemplation of the legislature; but I apprehend that on examination of the statute as a whole there is nothing in its provisions inconsistent with the view that persons having contractual relations with the company—who are dealing with the company in the ordinary way of business, whether buying power or electric light, or transmitting freight, or taking passage on the company's trams or trains—were not within the contemplation of the legislature.

Lord Field, in delivering the opinion of the Judicial Committee in Railton v. Wood, 15 App. Cas. at p. 366, quotes from Lord Selborne's judgment in Hill v. East and West India Dock Co., thus:—"On principle, it is certainly desirable in construing a statute, if it be possible, to avoid extending it to collateral facts and consequences beyond the scope and the general object and policy of the statute itself, and injurious to third parties with whose interests the statute need not and does not profess to directly deal."

There is another view of the section. I doubt whether the phrase "operations of the company" extends to the operation of the tramway. The Act recites the incorporation of the company; the acquisition by the defendant company of certain undertakings authorized by the legislature, and the powers and privileges exerciseable in connection with those undertakings; and the intention of the legislature to amalgamate all these undertakings and vest them in the defendant company, together with the powers and privileges connected with them. One of these undertakings was the Westminster and Vancouver Tramway Company, which had already, before the passing of the Act, been held to be a railway within the general Railway Act of British Columbia, and the view given effect to by that decision is recognized not only in the section I am discussing, but in sec. 5 of the Act as well. In respect of the limitation of actions this undertaking was governed

by the provisions of sec. 42 of that Act. That section, for the reasons I have mentioned, had no application to a cause of action for injuries suffered by a passenger on the trams or trains of the company by reason of the company's failure to take due care. The argument for the defendant company therefore involves this: that the claim for a passenger on the company's line between Vancouver and New Westminster (which, as I have said, has been held to be a railway, and in respect of which the company would, apart from sec. 60, be governed by sec. 42 of the Railway Act), who suffers by reason of such negligence, is subject to a limitation of 6 months; a limitation which, I believe, applies to no other railway in the province constructed under the authority of the provincial legislature. Now, it seems to me that the members of the phrase "tramway or railway or works or operations of the company" may be read separatim as describing different branches of the company's undertaking. So reading it, "works and operation" would properly apply to those branches of the undertaking not exclusively connected with the tramway or railway. Conceive an objection in committee to the comprehensive nature of the phrase "works or operations of the company," as extending the effect of sec. 42 of the Railway Act; the explanation doubtless would have been --this phrase applies not to the tramway or railway but to the other branches of the undertaking. That, I apprehend, is a view of this language not unreasonable; and I apprehend also that the considerations I have referred to bring the section within the second branch of Lord Wensleydale's golden rule; that is to say, that if the ordinary meaning of the words in question is that which the defendant contends for, then, taking the whole statute together, construing it together, these words so applied produce an inconsistency, absurdity, and inconvenience so great as properly to convince the Court whose duty it is to construe and apply them, that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them another signification which, in the opinion of the Court, they will bear: River Wear Commissioners v. Adamson, 2 App. Cas., per Lord Blackburn, at p. 764. In aid of this view of the section, also, one may apply the canon of construction stated by Sir Henry Strong, which I have already quoted at length.

BRITISH COLUMBIA.

(VANCOUVER.)

DUFF, J. MAY 31ST, 1905.

TRIAL.

CANADIAN BIRKBECK INVESTMENT AND SAVINGS CO. v. RYDER.

Registry Lands — Land Registry Act, B. C. — Mortgage — House Built Partly on Lot not Included—Rights of Mortgagee—Purchaser for Value—Notice—Registered Title.

On 19th January, 1899, one Johnston, being then the owner of lot 20, block 239, subdivision 526, in the city of Vancouver, applied in writing to plaintiffs for a loan of $1,000 upon the security of this lot. The written application stated that the money was required to assist in building two houses upon the lot. It also contained a description of the two houses so to be built, mentioning the number of rooms in each, and the estimated cost of each house. The application also prescribed the way in which the borrower required the mortgage moneys to be advanced, viz., $600 when the first house should be completed, and the balance of $400 when the roof should be on the second house. Johnston at this time was the equitable owner of the adjoining lot number 19, under an agreement for sale entered into by him with the legal owners. Johnston's application for the loan above mentioned was accepted by plaintiffs, and a mortgage of lot 20, in pursuance of the Short Forms of Mortgages Act, was executed by Johnston dated 28th February, 1899, and this mortgage was registered on 1st June, 1899. Johnston proceeded with the erection of the two houses, and on 7th March, 1899, received $600 on account of the mortgage moneys, plaintiffs' valuator reporting that the first house was completed. Subsequently, a further payment of $200 on account of the mortgage moneys was made, and on 24th June, 1899, plaintiffs paid over the remaining $200 on the report of their valuator that both buildings were completed.

At the same time the borrower Johnston made a statutory declaration, dated 24th June, 1899, inter alia:

"1. That the buildings on the property described in the above mortgage are wholly completed in accordance with the terms of the application for the above loan.

"2. That the said buildings are wholly situated upon the property described in the said mortgage."

One of the houses was not situated wholly upon lot 20, but was situated partly upon lot 20, and partly upon lot 19. On 28th July, 1899, Johnston paid the balance of the purchase money due under his agreement, and obtained a conveyance of lot 19, which conveyance was duly registered. On the same date, viz., 28th July, 1899, Johnston executed a mortgage of lot 19 to the Globe Savings and Loan Co., which was duly registered, and on 4th March, 1901, default having been made, the Globe Savings and Loan Company, under the powers in their mortgage, conveyed lot 19 to one Condell, which conveyance was duly registered. Disputes arose between Condell and plaintiffs as to the ownership of the house situate partly on lot 20 and partly on lot 19. Johnston having also made default under his mortgage to plaintiffs, they took possession of lot 20 under their mortgage, including the house in question, and on 25th April, 1904, were in possession of the house in question by their tenant. On that date defendant Annie Ryder, with notice of the dispute between Condell and plaintiffs as to the ownership of that portion of the house which encroached upon lot 19, and of the fact that plaintiffs were in possession of it as aforesaid, entered into an agreement for purchase of lot 19 with the representatives of Condell (he having died). She had, however, searched in the land registry office and found the title to lot 19 clear of any incumbrances, and that no easements or applications to register any easements or other documents affecting the title to lot 19 were on file. Plaintiffs continued in possession of the entire house and received the rents thereof until 27th July, 1904, when their tenant having vacated the house, defendant Annie Ryder entered into possession without the knowledge or consent of plaintiffs.

Plaintiffs brought this action to recover possession of the dwelling house and mesne profits and for an injunction restraining defendants from trespassing upon plaintiffs' mortgaged premises. The defendant Cory S. Ryder was the husband, and the defendant Walsworth was the tenant, of Annie

Ryder, the latter being in occupation of the house in question at the time of commencement of this action.

H. C. Wade, K.C., and W. S. Deacon, for plaintiffs.

J. Martin, K.C., and Rowland, for defendants.

DUFF, J.:—I have no doubt about this case. Assuming that the mortgage upon which the action is founded has the effect which Mr. Wade contends it has, namely, that by force of the Act respecting Short Forms of Mortgage, it did as between the parties to it convey to the mortgagee as security for the loan referred to some rights of occupation of lot 19; still it is quite plain to me that in respect of such rights, assuming such to have been created, plaintiffs never acquired any registered title.

It is contended by Mr. Wade that, because the mortgage was registered as a charge upon lot 20, plaintiffs acquired a registered title to all interests which between the parties were actually vested in plaintiffs by virtue of that instrument. I cannot agree with this contention. It is based upon the misconception that the Land Registry Act of British Columbia established, as the Registry Act of Ontario did, a system of registration of documents affecting title. The Land Registry Act of this province is intended to provide not a system of registration of documents, but a system of registration of titles. A person desiring to obtain a registered charge upon real estate in this province has to pursue a course which is pointed out in the plainest way by the statute. Under sec. 24 such person, subject to the exceptions therein mentioned, which are nothing to the purpose here, "may apply to the registrar for registration thereof in the form marked 'D' in the said schedule, and the registrar shall, upon being satisfied, after examination of the title deeds produced, that a prima facie title has been established by the applicant, register the title of such applicant in a book to be called the 'Register of Charges' in the form marked 'E' in the said schedule." The form "D" referred to in that section reads as follows: "I, of declare that I am entitled to a mortgage over the real estate hereunder described, and I claim registration of a charge accordingly." Then follows a space conveniently marked for the description of real estate. The form "E" referred to in that section provides spaces for the entry of the number of the charge, for the number

of the volume and folio of the absolute fees book, where the title to the fee in the property charged is entered, and for the description of the parcels charged.

It is perfectly obvious that the registration of a charge can under the Act be procured only by pursuing the course pointed out by the Act. For example, A. may hold a mortgage executed by B., mortgaging to A. a number of different parcels as security for the mortgage debt. A. may desire to register the mortgage as a charge on one of those parcels only. Pursuant to that purpose he applies under the Act for the registration of his mortgage as a charge on that parcel. The application is made in form D, as required by the Act; the mortgage as being one of the title deeds is furnished to the registrar in proof of the ownership of the charge by A. It would seem to be apparent that the registrar would not be justified on that application in registering the mortgage as a charge upon the other parcels; there is under the Act no warrant for taking such a course; in other words, an application under sec. 24 is, I apprehend, a condition precedent to the right to obtain the registration of a charge; an application, that is to say, containing a description of the property to which the charge applies and respecting which it is to stand as a registered charge. If there were really any doubt about that, it is made clear by sec. 41: "When two or more charges appear entered on the register affecting the same land, the charges shall, as between themselves, have priority according to the dates at which the applications respectively were made, and not according to the dates of the creation of the estates or interests." The application is all important therefore for the purpose of determining the question of priority between charges.

What is the fact here? Plaintiffs did not apply for the registration of the charge as a charge upon lot 19, the property against which it is sought to enforce the charge in this action; moreover, plaintiffs did not in fact obtain a registration of the charge as a charge upon lot 19. There is no entry in the books of the office shewing that lot 19 is affected by this mortgage. Plaintiffs have a charge against lot 20 only; and unless one uses words in a sense opposed to the sense which the words have in their ordinary use, it is impossible to understand how it can be said that plaintiffs have or ever had a registered chargo against lot 19 or any registered title or interest in lot 19. Therefore, assuming that as between

the parties, by reason of the provisions of the Act respecting short forms of mortgage, or by reason of the conduct of Johnston, or by reason of the statements made in the statutory declarations, and in the application—assuming that as between the parties by reason of these things the plaintiff did acquire some title to or some interest in lot 19, that title or interest is in my judgment an unregistered title or interest within the meaning of the Land Registry Act.

Then sec. 43, sub-sec. 4: "Every unregistered title, interest, or disposition affecting registered real estate, or any registered interest in real estate, shall as against a purchaser for valuable consideration of such real estate or interest be utterly void and of no effect unless the person holding or claiming such unregistered title or interest, or taking or claiming under or by virtue of such unregistered disposition, shall obtain from the owner and hold in respect of such real estate or interest a certificate of registered estate." Plaintiffs are claiming to own a charge upon lot 19. But in respect of lot 19 plaintiffs claim under an unregistered title or an unregistered interest or an unregistered disposition. That being the case, as against these defendants, who are purchasers for valuable consideration, that title, interest, or disposition is deemed to be utterly void and of no effect under the statute. The result is that plaintiffs fail in the action, and the action is dismissed with costs.

BRITISH COLUMBIA.

(VANCOUVER.)

DUFF, J. SEPTEMBER 15TH, 1905.

CHAMBERS.

RE RAILWAY PORTERS' CLUB.

Club—Public Inquiries Act—Benevolent and Friendly Societies Act—Commission of Inquiry—Jurisdiction.

Application on behalf of certain clubs incorporated under the Benevolent and Friendly Societies Act, to prohibit Mr. H. A. Maclean, who had been appointed by the Lieutenant-Governor in council a commissioner to inquire into the standing

of several clubs in the city of Vancouver, from acting as commissioner and making the inquiry, upon the ground of want of jurisdiction.

F. C. Wade, K.C., for the motion, contended that the Public Inquiries Act, under which this investigation was sought, was passed for the purpose of allowing the government to make inquiry into the conduct of all public business, such as the management of various departments of the government, administration of justice, and municipal affairs. If the commissioner appointed could inquire into affairs of private clubs, such as these, merely because they are incorporated under a public Act, he could also investigate by the same powers all incorporated companies, as also all partnerships and similar relations.

H. A. Maclean, contra.

DUFF, J.:—My opinion is asked, whether the appointment of Mr. Maclean can be justified, and I have come to the conclusion that it can.

In the first place, it seems to me it is quite impossible to say that charges of that character affecting a large number of organizations all domiciled in one place may not seriously touch the subject of good government of the province. The precise nature of the abuse is not in any way before me, but one can quite readily understand that powers such as are conferred by the Benevolent Societies Act might be so abused as to seriously affect public morals, and, in my opinion, if the municipality should complain to the Lieutenant-Governor in council of that state of affairs, the investigation of all the facts connected with it should come under sec. 4 of the Public Inquiries Act. In addition to that, I think the matter comes under sec. 4 of the Benevolent Societies Act, for this reason: the Lieutenant-Governor in council has power to cancel or rather to dissolve societies incorporated under that Act. The executive act resulting in such a conclusion is an exercise of the powers of government, and the question as to whether that power of government shall or shall not be exercised, certainly does touch the good government of the province, and certainly this is a statute which has for its purpose the ascertaining of facts for the purpose of enabling the Lieutenant-Governor in council to form a judgment upon the question as to whether the charter should be cancelled.

Section 4, above cited, of the Benevolent and Friendly Societies Act, R. S. B. C. ch. 13, as amended by ch. 3, statutes of B. C. 1905, reads as follows:—"The incorporation of any society as a social club incorporated under the provisions of this Act, may at any time be declared to be revoked and the society to be dissolved by order of the Lieutenant-Governor in council, and such revocation or dissolution may be upon such conditions and subject to such provisions as to the Lieutenant-Governor in council may seem proper."

Section 4 of the Public Inquiries Act, R. S. B. C. ch. 29, reads as follows:—"Whenever the Lieutenant-Governor in council deems it expedient to cause inquiry to be made into and concerning any matter connected with the good government of this province, or the conduct of any part of the public business thereof, including all matters municipal or the administration of justice therein, and such inquiry is not regulated by any special law, the Lieutenant-Governor in council may, by commission intituled in the matter of this Act, and issued under the great seal of the province, appoint commissioners or a sole commissioner to inquire into such matter."

BRITISH COLUMBIA.

(VANCOUVER.)

DUFF, J. AUGUST 30TH, 1905.

CHAMBERS.

RE COLLINS.

Extradition—Perjury—Affidavit in Alimony Suit in California Court—Jurisdiction of Extradition Commissioner—Warrant of Committal—Description of Offence—Self-imposed Oath—Jurisdiction of California Court—Truth of Statement in Affidavit—Materiality—Evidence of Criminality—Canadian Crime.

Motion by George D. Collins, upon the return of a habeas corpus, for his discharge from custody under a warrant of extradition issued by LAMPMAN, Co. C.J., as an extradition

commissioner, to surrender the applicant to the authorities of the State of California, to stand his trial upon a charge of perjury committed at San Francisco.

W. J. Taylor, K.C., and H. D. Helmcken, K.C., for the applicant.

Frank Higgins, for the prosecutors.

DUFF, J.:—It will be convenient first to consider some questions which come before me for the first time, because in the nature of things they could not come before the extradition commissioner; I mean those arising on the objections taken to the validity of the warrant of committal.

Broadly speaking, two objections are taken. First it is said that the warrant, being issued in a proceeding before a judicial officer of a limited statutory jurisdiction, should shew on its face that the statutory pre-requisites of his jurisdiction have been complied with. Secondly, it is said that the description of the offence contained in the warrant is insufficient.

In my opinion, these objections are both disposed of by reference to the Extradition Act, R. S. C. ch. 142. Section 20 of that Act is as follows: "The forms set forth in the second schedule to this Act, or forms as near thereto as circumstances admit of, may be used in the matters to which such forms refer, and when used shall be deemed valid."

The form of the warrant of committal under consideration is precisely in accord with the form prescribed by the statute. An examination of the Act convinces me that the true construction of sec. 20 is that the validity of a warrant of committal, issued under the authority conferred by the Act, does not depend upon the presence within the warrant of any element which is not indicated by the form provided by the statute. The recital, the absence of which, according to the contention, invalidates the warrant, is not a matter which, from the examination of the statutory form, would appear to have been within the contemplation of the legislature as forming a part of it.

In support of the objection, several cases are relied upon: the decision of Chief Justice Draper in Anderson's case, 11 C. P. 9; the decision of the Court of Queen's Bench in Re Blissett, 6 Q. B.; the decision of Mr. Justice Cross, in

Quebec, in Re Zinc, as reported in 6 Quebec L. R. 260, at p. 266.

With regard to the first two of these decisions, it is to be observed that they are decisions on the law, as it existed prior to the passing of the Canadian statute to which I have referred, and prior to the passing of the Extradition Act of 1870, and in neither case had the Court to deal with the section I have just read, or any provision analogous to it.

With regard to the last of these decisions, namely, the decision of Mr. Justice Cross,—that decision was, it is true, delivered subsequent to the passing of the Act of 1877, which contains provisions substantially the same as those of the Act of 1886, respecting the object I am now discussing. A section corresponding to sec. 20 appears in that statute, and a form corresponding to form 2 in the schedule of the Act of 1886 also appears there. But an examination of the opinion of Mr. Justice Cross in that case shews that this section and this form were not in that case relied upon by the prosecution, and the effect of them is not discussed by him.

Apart altogether from the authorities to which I am about to refer, I should have thought that in the absence of any discussion on the question, or any direct decision on the question, the coercive force of the section itself is such that I should be obliged to treat the decision of Mr. Justice Cross as one which I ought not to follow in this case. The matter, however, does not depend on my own unsupported opinion. It is, I apprehend, hardly open to doubt since the decision of the Queen's Bench Division, in 1891, in Re Bellencontre, [1891] 2 Q. B. 126, 144. In that case an objection was taken to the form of the committal issued by Sir John Bridge, under the Extradition Act of 1870; and, at p. 144 of the report, Mr. Justice Wills uses this language:—"The warrant is statutory in its form, and is not to be construed as an ordinary English common law document, and it is not at all necessary, in my judgment, that there should be anything like the same particularity that there would be in respect of the warrant of committal to the gaols of this country under ordinary circumstances. For these reasons, I am of opinion that this habeas corpus ought not to issue."

In two cases decided recently by the Supreme Court of the United States, one in 1902 and the other in 1903, a similar opinion is expressed by that Court concerning the attitude to be adopted in extradition cases with regard to

questions of technical procedure. The view of the Queen's Bench Division, in the case referred to—the view twice repeated by the Supreme Court of the United States in the cases I am about to read from—is that the technicalities of the criminal practice should not be allowed to smother or incumber the administration of the procedure prescribed by these modern statutes for the purpose of carrying out the obligations we have assumed under this vastly salutary international arrangement.

The language of Mr. Justice Brown, delivering the judgment of the Court, in the case of Grin v. Shine, 187 U. S. at p. 184, is as follows:—"These treaties should be faithfully observed and interpreted with a view to fulfil our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused. In the construction and carrying out of such treaties, the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such to put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, namely, submit themselves to the laws of their country. Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders. But where the proceeding is manifestly taken in good faith, a technical noncompliance with some formality of criminal procedure should not be allowed to stand in the way of faithful discharge of our obligations. Presumably, at least, no injustice is contemplated, and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community, is rather to be welcomed than discouraged."

In Wright v. Henkel, 190 U. S. 57, Chief Justice Fuller, delivering the judgment of the Court, used this language:—"Treaties must receive a fair interpretation according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent." That is the principle which I apply here.

It should further be observed that in the Bellencontre case the description of the offence was not characterized by any greater particularity than the description of the offence contained in the warrant now before me. I must say that, at the first blush, I was disposed to think that there was some ground for the contention that, as the treaty provides that the person who is extradited shall be tried only on the charge upon which the extradition is based, the warrant of committal ought to describe the offence with particularity and precision. But, whatever virtue I might find in that argument if the matter were res integra, the decision of the Queen's Bench Division in In re Bellencontre is conclusive, and is a decision which I am bound to follow.

It follows that effect should not be given to the objections taken to the warrant of committal.

I now come to consider the substantial questions raised with regard to the power of the extradition commissioner on the evidence before him to commit the prisoner for surrender.

One general observation should be made at the outset—I do not sit to hear an appeal from the extradition commissioner. I can only deal with the jurisdiction of the extradition commissioner to make the order which he has made.

The conditions of extradition which have been discussed in the course of this argument, and which are all more or less material here, are, first, that the imputed crime shall be a crime within the extradition treaty; secondly, that it should be an extradition crime within the Extradition Act of 1886; thirdly, that it should be a crime within the law of the demanding country; and, fourthly, that the commissioner shall have before him such evidence of criminality as, if the crime had been committed in Canada, would, according to the law of Canada, justify the committal of the accused for trial.

Before discussing these conditions in detail, I think I ought to refer to a case which was cited during the course of the argument a good many times, which I think should no longer be followed in its entirety, although it was the decision of a tribunal of the highest character for learning, for judicial distinction, and judicial authority. The demanding country is strictly the United States, but within the rules I have just mentioned in this case the demanding country is California, and when I say that the imputed crime must be a crime in accordance with the law of the demanding country, I mean that the imputed crime must be a crime

under the law of California. In Ex p. Windsor, 10 Cox C. C. 118, the case to which I have just referred, it was held that on the true construction of the treaty, where the United States demands extradition of a person in Great Britain on a charge that such person has committed a crime in the United States, the crime charged must be shewn to be an offence against the general law of the United States. The Court proceeded under a misapprehension in respect to the federal laws of the United States, assuming against the fact that there is a common criminal law of the United States. That case has several times been commented on in the course of Canadian decisions; and quite recently, in the case I have just referred to, in the case of Wright v. Henkel, the misconception I have mentioned was pointed out by the Supreme Court of the United States, and that Court stated that, in so far as the decision involved the view I have just mentioned, it is not to be followed in the United States. That view, I think, must now be regarded as given per incuriam. And the requirement, as I have said, which is a condition of the power of the Extradition Commissioner to commit for extradition in this case, is that the imputed crime shall be a crime under the law of the State of California.

The crime charged is perjury. At an earlier stage, a question was raised before me in another proceeding whether perjury is an extradition crime within the meaning of the treaty, or an extradition crime within the meaning of the Act of 1886. I then expressed the view that there could be no possible doubt about that—that perjury is a crime within the treaty and the Act, and that point has not been urged before me on this application.

Perjury is defined by the Penal Code of California, in secs. 118 and 118a of the Code, as follows:—(118) "Every person who having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury." (118a) "Any person who, in any affidavit, taken before any person authorized to administer oaths, swears, affirms, declares, deposes, or certifies that he will testify, declare, depose, or certify before any competent tribunal, officer, or person, in any case then pending, or thereafter to be instituted, in any particular manner, or to any

particular fact, and in such affidavit wilfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury. In any prosecution under this section, the subsequent testimony of such person in any case involving the matters in such affidavit contained, which is contrary to any of the matters in such affidavit contained, shall be prima facie evidence that the matters in such affidavit were false."

Now, exception is taken to the evidence upon which the extradition commissioner based his conclusion that there was before him a prima facie case of perjury against the accused, on the ground, first, that the evidence shewed that no oath was administered to the accused; that what occurred amounted at most to a self-imposed oath; and, relying upon a decision of the Supreme Court of California, the case of People v. Simpton, 65 Pac. Rep. 834, it was contended that a transaction which could be brought within that description, is not an "oath" within the definition of perjury which I have just read.

In the case referred to there is to be found this language, at p. 835:—"In United States v. McConaughy, 33 Fed. 168, the indictment alleged that defendant did 'depose and swear' and that 'said oath, taken as aforesaid, was then and there administered.' The Court sustained a demurrer to the indictment, and in the opinion said: 'In an indictment for perjury, it must be directly stated in some form of apt words that the defendant was sworn. It is not sufficient that it appears by inference, or argument. One may swear who is not duly sworn. In one case, so to speak, the oath is self-imposed, and the swearer incurs no legal liability thereby, while in the other the oath is administered by a person having authority so to do, and the affiant takes it subject to the pains and penalties for perjury.'" And there is another case referred to in the course of the opinion in which it was held that an allegation in an indictment, that an oath had been taken "before the person authorized to administer the oath," was not an allegation that an oath had been administered within the meaning of perjury defined in the Code.

It is to be observed, in the first place, that these are decisions upon demurrers to criminal pleadings, in which the allegations must be precise and complete. No decision of a California Court, or of any Court, has been called to my attention, in which it is held that—if the facts were that the oath

was taken by the deponent in the presence, with the sanction, and by the authority of an officer who was authorized to administer the oath—that such facts would not in law constitute the administration of an oath. I should be surprised to hear of any decision going so far. And that is the state of things that we have to deal with here. We are not dealing with a question as to the construction of the language of a pleading arising on a special demurrer. We are dealing with the question whether the commissioner had before him, on the facts stated, reasonable evidence to support his finding that as a matter of fact an oath was administered to the accused within the meaning of secs. 118 and 188A of the Penal Code of California, defining the offence of perjury. I mention one or two considerations which lead one to think that such acts, in such circumstances, must be regarded as constituting the administration of the oath. I put it to Mr. Taylor during the course of the argument, whether if the clerk of a notary, in the presence of the notary, and by his direction, repeated the obligatory words to the deponent, who took upon himself the obligation of the oath, and went through all the prescribed formalities; and if the formal attestation, by the signature of the notary, and by the attachment of the notarial seal, were complete—whether it would be open to contend that that was not sufficient to constitute a due administration of the oath according to law. It seems to me that it is hardly open to argument. The clerk is merely the instrument of the notary for repeating the language. And I am unable to see why, on principle, provided always that the deponent is in the presence of the notary, and that the proceedings is clothed with the official authority of the notary, why, if that be the case, the instrument for repeating the language may not be the deponent himself. Certainly, there seems to be no good ground, on principle, why the one form should not be as binding as the other. But the matter is really put beyond peradventure by the amendment of the Code, which was passed in 1905, sec. 121: "It is no defence to a prosecution for perjury that the oath was administered or taken in an irregular manner, or that the person accused of perjury did not go before, or was not in the presence of, the officer purporting to administer the oath, if such accused caused or procured such officer to certify that the oath had been taken or administered."

I could not consider the fact that—a deponent having repeated obligatory language—the notary said nothing, con-

Section 137, I should have thought, had the effect only of curtailing this equitable right which existed prior to the enactment of the Code, and confining it to the cases which are expressly referred to in sec. 137. But that is a vastly different thing from limiting the jurisdiction of the tribunal. The accused put before me in the course of his argument a definition of jurisdiction quoted from Chand on the Law of Res Judicata. "Jurisdiction," says that author (p. 240), "has been described as the right to adjudicate concerning the subject matter in a given case." We may accept the definition as sufficient for our present purposes. I apprehend that it would be a strong thing to read sec. 137—professing only to prescribe the conditions under which an existing right of action for alimony can be enforced—as depriving the Court of the power to adjudicate upon a claim for alimony in a given case. If the section in question had, instead of conditioning the cause of action, wholly abrogated it, nothing but the most express language would be held to deprive the Court of the power to adjudicate upon such a claim. To give to the language under consideration the effect contended for would be to enlarge by intendment the scope of a legislative enactment in a manner outside the functions of a court of justice. No authority has been cited which supports this contention. A series of cases has been referred to, which proves this, that where a special statutory power is conferred on a Court in California, or where a special proceeding of the kind defined by the Code (namely, a proceeding which is not an action), is authorized to be taken before a Court, the power of the Court to exercise jurisdiction, or to entertain the proceeding, is limited by the terms of the statute. And further, the cases do seem to go this far, that in respect of such a special statutory jurisdiction, or of such a special proceeding, the Court, although otherwise a court of general jurisdiction, is to be treated as an inferior court. It is sought to apply that class of cases here. But, of course, the application of these cases here assumes in favour of the applicant the very point in controversy, namely, that sec. 137, instead of limiting and regulating the right of action for alimony, only restricts the power of the Court to adjudicate upon a claim for alimony.

The commissioner had before him the opinion of Mr. Whiting, that sec. 137 is not aimed at the jurisdiction of the Court, and nothing has been advanced before me to justify the conclusion that he was wrong in acting on that opinion.

But there is a further point. The view has been put forward by Mr. Whiting, who cites some authorities in support of his contention—these I do not intend to go into—that, notwithstanding sec. 137, the general equitable right to relief in claims for alimony, as it existed prior to the Code, still exists. The cases referred to, in my opinion, do not support that view very strongly. But they are not inconsistent with it, and the general tenor of the opinions in those cases gives colour to the view which has been put forward by Mr. Whiting. I confess that on that point the argument addressed to me by the accused, if I had to deal with the matter as a question of Canadian law, was an argument which at present I see no answer to. But there is this circumstance, that this complaint, which is said to disclose facts which, under sec. 137, deprived the Court in question of the power to deal with this action at all, was made the subject of a demurrer. That demurrer came before Judge Graham, who was the Judge of that Court, and was overruled by him.

Now, I wish to make it perfectly clear, that in my view the extradition commissioner would not have been justified, on the mere production of the record of the determination of the question raised on demurrer, in treating that record as evidence of the law of California upon this question.

Apart from some statutory exceptions, there is one way, and only one way of proving foreign law, in a Court in this country, and that is by the evidence of experts, who give their opinion with regard to the foreign law as a question of fact. And it is dealt with entirely as a question of fact. Without the evidence of some person who was competent to give testimony as to the law of California upon that point, I think that neither the extradition commissioner, nor myself, would be entitled to consider that record. But in the examination of the accused, who is a competent witness on the law of California, and was called as such before the extradition commissioner, the existence of this decision was proved; it was admitted by him that both the question of the sufficiency of the allegations to support the cause of action itself, and the contention of the defence that these allegations disclosed facts depriving the Court of jurisdiction to entertain the complaint, were raised by this demurrer, and on these points the contentions of the defence were overruled.

It was rather vehemently argued that there being no evidence before the commissioner of the reasons leading to the

determination of the demurrer, and the determination being in its nature interlocutory, I cannot properly consider it as affecting this question.

The commissioner had before him a concrete question depending on the law of California, viz., whether the Superior Court of the State of California had jurisdiction to entertain and adjudicate upon the claim made in the action in which the affidavit was filed. On that question he had the opinion of one competent witness affirming the existence of the jurisdiction, and the opinion of another denying it. It is contended that in weighing these opinions the commissioner was obliged to ignore the decision of that Court upon the precise question on which he was asked to pass. The statement of the contention seems sufficient; perhaps one invests it with too much importance in treating it as a subject for serious discussion.

Another case which I will merely mention—the case of Hardy v. Hardy—was referred to on behalf of the applicant as supporting the applicant's contention with regard to the construction of sec. 137. I have only this to say about that case. I have read the opinion, and in my judgment, while nothing was said on this exact point, the language in the opinion points very strongly to this view put forward by the prosecution as the view of the Court on the construction of that section.

It is then said that the extradition commissioner was wrong, because he ought to have held, upon the evidence before him, that the accused was not guilty of perjury, inasmuch as the evidence disclosed the fact that prior to the time of the alleged marriage, on which the action for alimony was based, the applicant had entered into a valid marriage with a woman who at that time was living, and, consequently, that the statement denying the marriage alleged in that action—on which the prosecution was founded—was not a false statement. But the commissioner has given his views on that subject. I am bound to say, while I express no opinion on it (I think it is not desirable that I should express any views as to the merits of the contentions between these parties on the question of fact), that the view taken by the commissioner in regard to that is a possible view on the evidence. I am unable to say that he was wrong in thinking that the evidence upon which that contention was founded was not evidence

which he could wholly accept, or which he should take as establishing the facts which it was designed to prove.

Then it is said also that another essential requirement of sec. 118 is wanting: in that the false statement complained of was not a material matter within that section. The procedure of California, which requires that pleas in actions of this kind shall be verified by affidavit, excepts cases in which an admission of the truth of the allegations in the complaint might subject the party filing the plea to a criminal prosecution. It is said that the admission of one of the allegations in the complaint, in the proceeding referred to, would, or might, subject the accused to a prosecution for bigamy, and, that, as a matter of fact, at the time there was a prosecution for bigamy pending.

I pass by a question which it occurred to me might arise on the construction of that section of the Code of Civil Procedure, namely, whether the section applies to the admission of an isolated fact, which might simply form one of a number of the constituent elements of a crime. I assume that the admission of any single fact, which, with others, would go to constitute a crime, would be within that section. In the first place, it seems to me that there can be no question that the allegation was material. In the second place, I apprehend that the applicant must go to this length in order to sustain his contention, namely, that if a witness, being asked a question in a witness box, answer the question, and afterwards a prosecution for perjury is based upon his answer, he could then set up the defence, "I was not bound to answer that question, I might have taken exception to it on the ground that the answer might expose me to a criminal prosecution." I do not see how any distinction can be drawn between the evidence of a witness given in the witness box, and a statement of fact made in an affidavit of the character which has been referred to here. The law of California required the making of the affidavit in all cases, except the cases I have mentioned. The party chooses not to take advantage of the exemption; until the privilege is claimed the party can be compelled (and, therefore by the enactment quoted, is required) to verify the statements in his plea; and, the privilege not having been claimed, the oath was consequently both authorized and required in this case. Now I think I have dealt with the objections based upon the law of California. I have perhaps gone into these objections a little more fully

than is necessary, because, as I have said several times, all these questions with regard to the law of California are questions of fact; the extradition commissioner has pronounced upon them; and it would be sufficient for me to say that he had evidence before him as to the law of California, on which he might reasonably come to the conclusion which he has reached. In that case, I should have no power to interfere with his action, because I am not sitting as a court of appeal, but simply sitting to consider the question whether he had jurisdiction to do what he has done.

Now, there is another condition of extradition, requiring that there shall be such evidence of criminality as, if the crime had been committed in Canada, would, according to the law of Canada, justify the committal of the accused for trial by an examining magistrate.

The exact language in the treaty is as follows:—"Provided that this shall only be done upon such evidence of criminality, as according to the laws of the place where the fugitive, or person, so charged was found, would justify his apprehension and commitment for trial, if the crime, or offence, had been there committed."

The material provisions of the Extradition Act allied to this provision of the treaty, which I shall read together, are sec. 2, sub-sec. (b): "The extradition crime may mean any crime which, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in the first schedule to this Act." Section 11 reads as follows: "If in the case of a fugitive alleged to have been convicted of an extradition crime, such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, prove that he was so convicted, and if in the case of a fugitive accused of an extradition crime such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, justify his committal for trial, the Judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison." And sec. 24: "The list of crimes in the first schedule to this Act shall be construed according to the law existing in Canada at the date of the alleged crime, whether by common law, or by statute, made before or after the passing of this Act, and as including only such crimes of the description comprised in the list, and as are, under that law, indictable offences."

It is argued that there was not sufficient evidence of criminality within these provisions; because, in the first place, the proceeding in which this affidavit was made has no analogue—or, at all events, the extradition commissioner had no evidence before him that it has any analogue in any part of Canada; and that if an affidavit verifying a defence had simply been filed, as in this case, it could only here be treated as an impertinence; that the oath in such a case could not be regarded as having been administered under the authority of any law, or statute, in force in Canada, or in any province of Canada, and that, therefore, according to the law of Canada, perjury could not be assigned upon any statement made under its sanction.

I should first clear up one point which, in the course of some interlocutory observations during Mr. Taylor's argument, Mr. Higgins endeavoured to make. It appears that the plea in question, and the affidavit verifying it, were read upon an interlocutory application for alimony. And it was contended by Mr. Higgins that the affidavit was made not merely to be used as complying with the provisions of the Code of Civil Procedure, which I have referred to, and which requires a verification of the plea, but it was made for the purpose of being used as evidence on that application. I do not know whether the extradition commissioner dealt with that view of the subject or not. I should hesitate to say that the evidence of the counsel for the accused on that application, upon which the contention was based, was of such a character as to justify the view that the affidavit was used on that proceeding as evidence of any fact stated in the plea. The evidence upon it is ambiguous, and certainly one fair view to be taken of it is that the pleading was read to shew the issues, and to shew the state of the cause simply. And I deal with the case on the assumption that this affidavit is to be treated as an affidavit made only for the purpose of verifying a plea in accordance with the rule of practice which I have referred to.

The contention, I think, is based upon an erroneous conception of the effect of that provision of the treaty. The meaning of the treaty provision, and the meaning of sec. 11, which specifically provides that the evidence shall be such evidence as would justify the committal of the accused for trial if the crime had been committed in Canada, has been

the subject of a great deal of discussion in Canada and in the United States.

It was held by Sir John Beverley Robinson and Mr. Justice Burns, in Re Anderson, 20 U.C.R. 124, that that section, and the provision of the treaty I have read, were to be taken as providing that the law of Canada is to supply the test to determine the admissibility and the quantum of evidence required, and not as requiring that the acts of the accused shall bring him within the imputed crime as defined by the law of Canada.

It is contended that this view has not been generally followed; and in support of that some Canadian cases and a number of American cases are cited, and a quotation is made from Moore on Extradition (the leading American text book), which reads as follows:—"It has been held that the rule that the evidence must be such as to justify commitment for trial at the place where the fugitive is found, if the offence had been there committed, applies not only to the admissibility and the amount of the evidence required for that purpose in the particular case, but also to the definition of the offence."

It cannot be successfully maintained that this paragraph states the settled American law on this subject; because in Wright v. Henkel (supra) the Supreme Court of the United States treat the question as still open. It is, however, in my opinion not necessary to decide between these conflicting authorities; and I propose to deal with this application as if the view expressed by Mr. Moore (and most favourable to the accused) were correct; and the view of Sir John Beverley Robinson and Mr. Justice Burns, a view which cannot be sustained.

One further point may be conceded for the purpose of the present discussion; and I mention it only that I may not be supposed to have given a decision upon it. The tribunal over which the extradition commissioner presides is a federal tribunal, established by the Parliament of Canada for the "administration of a law of Canada." If the Commissioner may take judicial notice of the procedure prevailing in the Superior Courts of British Columbia, I know no reason why this judicial cognizance may not extend to the procedure prevailing in such courts in every part of Canada; and if that be so, I am unable to say that among the materials upon which he proceeded there was not the fact that a practice

corresponding to the California practice referred to obtains in Quebec and Manitoba. I pressed counsel for assistance on this point but have had none. The case referred to, Rex v. Knight, 5 A. & E. 205, decides only that a Judge presiding at the assizes has not judicial cognizance of the practice of a special statutory tribunal such as the "Insolvent Debtors Court." Besides the reasoning based upon that case proves too much. It is hardly arguable that a Judge presiding at a Criminal Assize in British Columbia would not have judicial cognizance of the practice of the Supreme Court of British Columbia. In the absence of a satisfactory argument I express no decided opinion upon the point, and will assume that in the absence of evidence of any such practice the Court was bound to take it that no such practice exists.

Now, it is contended by the applicant that on these authorities to which I have referred, you have to go through the conduct upon which the criminal charge is based, and you have to come to the conclusion that the identical acts, if done in this country, would have constituted a crime under the law of Canada. Taken with due qualifications, we need not quarrel with that, but it is obvious from the outset that there must be some qualification. In the first place, the treaty itself, which, after all, is the controlling document in the case, speaks not of the acts of the accused, but of the evidence of "criminality," and it seems to me that the fair and natural way to apply that is this,—you are to fasten your attention not upon the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts in their bearing upon the charge in question. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with. To illustrate, I apprehend that in the case of perjury, the accused cannot be heard to say, "the oath on which the charge is based was administered by A. B., an officer who had no authority to administer oaths in Canada—(although duly authorized in the place where the oath was taken); and, consequently, if I had done here the identical thing I did there (viz., the taking of an oath before A. B.), perjury could not have been successfully charged against me." The substance of the criminality charged against the accused is not that he took a false oath before A. B., but that he took a false oath before an officer who was authorized to administer the oath.

Any other view would, I conceive, simply make nonsense of the treaty.

On the other hand, to get an illustration of what I should regard as a correct application of this provision, let us take the Anderson case. Anderson was a slave in Missouri, one of the slave States of the American Union. According to the law of that State, citizens of the State were not only entitled, but were bound, to assist in the capture of slave runaways. Digges was a citizen of the State. Anderson was escaping. Digges attempted to capture him, in accordance not only with his legal right, but with his legal duty. Anderson, in resisting capture, killed Digges. Anderson fled to Canada; he was indicted in Missouri, charged with murder, and his extradition was demanded. It was held by a majority of the Court of Queen's Bench, that in considering the question whether there was evidence of criminality in accordance with the law of Canada, you had to deal with the case on the assumption that Digges, in attempting to capture Anderson, was acting with legal authority. It is true that Anderson was afterwards discharged from custody because of certain technical defects in the proceedings. The decision of the Court of Queen's Bench on that matter of substance was, however, not interfered with, although the opinion of the majority of the Court upon the construction of sec. 11 of the statute, which I have already given, has been referred to with disapproval since. It seems to me, that in substance the decision of Sir John Robinson and Mr. Justice Burns is correct in that case, and their decision is an example of the fair and proper application of the provisions in question.

The point cannot be put better than it is put by Sir Edward Clarke. On p. 250, in the note, he says: "In Anderson's case this question did not necessarily arise. The crime charged against him on the facts stated was murder by the law of England, as well as by that of the United States. The question whether the circumstances shewed sufficient provocation to reduce it to manslaughter was one for the jury, and one with which the Canadian courts had nothing to do. Nor had these courts any right to inquire into the justice or policy of the legislative enactment under which the arrest was attempted to be made. That was a matter for the consideration of the foreign country, and could not, however it was resolved, affect the nature of the crime. An illustration may be given in the English Act 14 & 15 Vict. ch.

18, by which, if three poachers are out together at night, armed, any person is authorized to apprehend them. It is very probable that American Judges would disapprove of that Act as part of what they might consider an iniquitous system of game laws; but, so long as it remains upon the English statute book, a poacher killing a person, so attempting to apprehend him, would, unquestionably, be guilty of murder, and England would have an indisputable right to claim him under the treaty. So far as this question was decided in the case of Anderson, it was decided rightly."

One may look at it in two ways. One may take it that one is to apply one's mind to the conditions existing in the demanding state; or that one is to conceive the accused, and the acts of the accused, transported to this country;—in the first case, one is to take the definition of the imputed crime in accordance with the law of Canada, and apply that to the acts of the accused in the circumstances in which those acts took place. If in those acts you find that the definition of the crime is satisfied, then you have the statutory and treaty requisites complied with. In the second case, if you are to conceive the accused pursuing the conduct in question in this country, then along with him you are to transplant his environment; that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged.

Treating the matter in that way, then what have we here? If my view of the law of California is correct, we have this. We have the fact that there was a proceeding pending in a court of competent jurisdiction, the practice of which court authorized a certain affidavit to be made in that proceeding. The affidavit was made, and it contains a wilfully false statement of fact. In other words, in addition to all the other elements of perjury, you have an oath taken in a judicial proceeding before a court of competent jurisdiction after a manner in which it was authorized by law. These facts make up the substance and essence of the "criminality" charged against the accused. If you transfer these facts to this country, you get the offence of perjury within the law of Canada.

I should refer also to a sentence in Sir Edward Clarke's book, pp. 252 and 253: "The prosecution must produce

sufficient evidence of criminality; that is, they must not only prove the commission of the acts described in the depositions, but also that they come within the definition of one of the crimes named in the Act under which proceedings are taken." I am unable to come to the conclusion that the requirement, as stated by Sir Edward Clarke, has not been complied with in the proceedings before the extradition commissioner.

But it is further said that those things which were done by the accused would not amount to perjury if they were done here, because, in addition to the matters I have mentioned, certain essential formalities of a valid oath, according to the law of Canada, were not observed. One of the defects relied upon is the failure of the deponent to touch the Gospels. That objection, I think, is set at rest by the section of the British Columbia Evidence Act of 1902, not referred to during the argument, but which, in British Columbia, authorizes an oath to be taken by raising the hand, thus dispensing with the kissing or touching of the book, and importing into this country the practice prevailing in Scotland. That seems to me entirely to dispose of that point.

Then again, it is said that by the law of Canada, the failure on the part of the notary to administer the oath in the sense of repeating the obligatory words is fatal to the legal validity of the oath. I have already given my reasons for thinking—if it were necessary to decide that question—that what was done here was sufficient to constitute a valid oath in this country. But I do not think that the prosecution is driven to that. In my opinion, where the real essence of the oath is preserved, and the formalities are sufficient by the laws of the demanding country, no mere deviation from strict ceremonial, according to the practice here, would be sufficient to prevent the application of this treaty and this statute. In other words, if what is done is in substance the administration of an oath, as that rite is generally understood, then, so long as the requirements of the jurisdiction in which the oath is taken are complied with, so that the oath, as taken, is there regarded as legally binding on the conscience of the party taking it, and subjecting him to the penalties of false swearing, you have a sufficient compliance with the treaty and statute. The substance of the matter is the taking of an oath in a foreign jurisdiction, in accordance with, and after the manner which, by law, is sanctioned in that jurisdiction.

In this case, as I am satisfied that the extradition commissioner properly held that the evidence before him furnished a prima facie case that the oath was validly taken according to the law of California, it is not necessary, I think, to decide whether there was evidence that the ceremonial prescribed by the law of this country was punctiliously observed.

I have only this to add, that I think the language which I have read from the opinion of Mr. Justice Brown in the case of Grin v. Shine, should be repeated with redoubled emphasis when you are dealing with an arrangement between two countries, having three or four thousand miles of common frontier, affording unexampled opportunities for the escape of persons accused of crime from either country to the other.

The result will be that the prisoner will be remanded to the custody under the warrant issued by the extradition commissioner, from which he was taken by the writ of habeas corpus.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. SEPTEMBER 11TH, 1905.

TRIAL.

ARMSTRONG v. ERICSON.

Vendor and Purchaser—Contract for Sale of Land—Payment by Instalments—Default—Right of Vendor to Cancel—Delay—Tender—Resale.

Action for an injunction restraining defendants from selling or offering for sale certain lands in Wetaskiwin in derogation of plaintiff's rights under an agreement between him and defendant Ericson.

J. E. Wallbridge, Edmonton, for plaintiff.

C. de W. Macdonald, Edmonton, for defendants.

SCOTT, J.:—On 1st August, 1902, defendant Ericson entered into an agreement with plaintiff for the sale to him of the lands in question for $700, payable on or before the expiration of 5 years from the date of the agreement, with interest at the rate of 10 per cent. per annum, payable on the 1st days of February and August in each year. The agreement contained the following proviso: "And it is hereby expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the times and in the manner above mentioned these presents shall be null and void and of no effect, and the said party of the first part shall be at liberty to resell and convey the said lands to any purchaser thereof, and all moneys paid thereon shall be absolutely forfeited to the said party of the first part."

The defendants contend that plaintiff having made default in the payment of certain interest moneys payable under the agreement and of certain taxes assessed against the property, the defendant Ericson, being entitled so to do under the proviso referred to, cancelled the agreement for sale to plaintiff, and resold the lands to defendant Hamilton, and that, by reason of such cancellation, plaintiff has now no interest in the property.

Plaintiff duly paid the first instalment under the agreement. Shortly before the second payment of interest became due, on 1st August, 1903, he entered into negotiations with defendant Hamilton, who is his son-in-law, for the sale to him of a half interest in the property, and they appear to have instructed a conveyancer to draw up an agreement for such sale. In part performance of that agreement defendant Hamilton paid defendant Ericson the second payment of interest at or about the time it became due. Plaintiff afterwards refused to execute the agreement for such sale, on the ground that defendant Hamilton had not done all that was required to be done by him to entitle him to its execution. It is unnecessary for me to determine whether the plaintiff was justified in so refusing, as neither the terms of the agreement nor defendant Hamilton's rights, if any, thereunder are material to the issues in this action.

About 1st February, 1904, plaintiff, being then unable to pay the interest due on that date, applied to defendant Ericson for and obtained from him an extension of time for its payment until 1st March following. Shortly before 22nd

February, Ericson saw Hamilton, and, knowing that the latter claimed a half interest in the property under an agreement with plaintiff, suggested to him that he should pay the interest then overdue, stating that if it was not paid he would lose his interest in the property. About that date Hamilton drove out to Ericson's farm for the purpose of paying the interest and he then paid it, but it was then arranged between them, apparently at Hamilton's request, that Ericson should cancel his agreement with plaintiff and resell the property to Hamilton on the same terms. An agreement in writing was accordingly entered into between them on that date, whereby Ericson agreed to sell the property to Hamilton for $700, payable $300 on 1st August, 1904, and $400 on 1st February, 1905, with interest at 10 per cent. from the date of the agreement. On 5th March following plaintiff caused the amount of the overdue interest to be tendered to defendant Ericson, but he refused to accept it.

The only evidence of there being any arrears of taxes against the property is the statement of plaintiff that on 22nd February the taxes had been left unpaid by him.

There is nothing to shew that the taxes so left unpaid were then in arrear. Even if taxes were then in arrear, I am of opinion that the proviso referred to does not empower defendant Ericson to cancel the agreement for their non-payment. That proviso, in my view, empowers him to cancel the agreement for non-payment of the purchase money and interest merely. It provides that unless the payments are punctually made at the times and in the manner mentioned in the agreement it shall be void, and the only payments the time and manner of which are specified in it are those of the purchase money and interest.

I am inclined to the view that the acceptance by Ericson from Hamilton of the interest due on 1st February, 1904, under the agreement between the former and plaintiff, was a satisfaction of all arrears thereunder, and that plaintiff's default, if any, was thereby waived by Ericson.

I think that such was the effect, notwithstanding that it may have been stipulated by Ericson that such payment was to be a condition precedent to his entering into the agreement for sale to Hamilton. I have already shewn that by the terms of the written agreement between them it formed no part of the consideration for the sale. I think, however, that it is unnecessary for me to decide that question, as I am of

opinion that plaintiff is entitled upon other grounds to the injunction claimed by him.

I have already held that plaintiff obtained from Ericson an extension of time for the payment of the interest until 1st March, and that he tendered the amount of it to him within 5 days thereafter. A delay of 5 days in making it, is not, in view of the nature of the property, an unreasonable delay, nor such as would entitle defendant Ericson to cancel the agreement.

Injunction to issue restraining defendants from selling, offering for sale, or otherwise dealing with the lands mentioned in the statement of claim in derogation of plaintiff's rights under the agreement between him and defendant Ericson referred to in the statement of claim.

Plaintiff to have the costs of the action.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. SEPTEMBER 11TH, 1905.

TRIAL.

FURLONG v. THOMAS.

Contract—Work and Labour—Agreement to Work Adjoining Homesteads together — Partnership—Goods Purchased—Account—Counterclaim.

Plaintiff alleged that in or about April, 1903, he requested defendant to purchase certain stock and implements for him, and advanced him $725 for the purpose: that out of that sum defendant purchased the stock and implements enumerated in the statement of claim; that from the time of the purchase until April, 1904, plaintiff lived with defendant and worked for him, retaining the stock and implements on his (defendant's) farm; that defendant refused to allow plaintiff to remove the same, claiming them as his property; and that he threatened to dispose of them. Plaintiff also alleged that between March, 1903, and April, 1904, he advanced to defendant and paid for him sums amounting in all

to $217, which defendant had not repaid and refused to repay. Plaintiff claimed an injunction restraining defendant from dealing with or disposing of the stock and implements, an order for the delivery thereof to him, damages for their detention, and repayment of the $217.

Defendant alleged that a partnership existed between him and plaintiff for the purpose of working and stocking their respective homesteads; that defendant contributed $200 towards the assets of the partnership, together with certain other considerations; that any sums received by him from plaintiff were paid by him and received by defendant for the purpose of the partnership; that the stock and implements alleged to have been purchased were purchased with the funds and on account of the partnership. In the alternative the defendant counterclaimed $588.20 for money lent, money paid, goods sold and delivered, and for work done for and board and lodging furnished to plaintiff at his request.

O. M. Biggar, Edmonton, for plaintiff.

J. E. Wallbridge, Edmonton, for defendant.

SCOTT, J.:—Plaintiff and defendant came to the Territories from Spokane, Washington, in March, 1903, and took up adjoining homesteads. Plaintiff resided with defendant upon his homestead for the greater portion of a year, and, apparently in pursuance of an understanding to that effect between them, they appear to have worked together in improving the two homesteads. I find that, in addition to the sum of $25 advanced by plaintiff to defendant on their journey, the repayment of which is not claimed by plaintiff, he gave defendant $927 shortly after their arrival, of which $725 was expended by defendant in the purchase of 10 head of cattle, a team of horses, a set of harness, a waggon, mower, rake, plough, and harrow. I find that these articles were purchased by defendant for and on account of plaintiff; that there was no partnership between them with respect to those articles, as it was not the intention of the parties that they should be included in the arrangement between them respecting the work on the homesteads. Of the cattle so purchased by defendant, one cow died and a steer was sold by him for $27.50, for which sum he should account to plaintiff. I hold that plaintiff is entitled to an immediate judgment for the

return of the remainder of the cattle so purchased by defendant, with their increase, and also for the return of the horses, harness, and implements so purchased, and to an injunction restraining defendant from dealing with same. I also gave judgment for plaintiff for $229.50, viz., $202, being the balance of the $927 which was not expended by defendant on account of plaintiff, and $27.50, being the proceeds of the sale of the steer. I also hold that the cow shewn by the evidence to have been purchased from one Daniels by defendant, with its increase, is defendant's property.

As to the counterclaim. A portion thereof amounting to $76.45 is admitted. Defendant is undoubtedly entitled to reasonable compensation for boarding and lodging plaintiff for the time the latter lived with him, but from this should be deducted the value of the work done by plaintiff on defendant's homestead, less the value of the work done by defendant on plaintiff's homestead.

Plaintiff is also entitled to recover any sums which were actually expended by him in feeding plaintiff's cattle, but not anything expended in feeding plaintiff's horses, as he (defendant) is shewn to have been working them from the time they were purchased, and I think I may assume that they were at least worth their keep. Defendant is also entitled to the value of any lumber and seed grain furnished by him for plaintiff's homestead and of the goods furnished to him. I find it impossible, however, from the evidence before me, to determine what amount defendant is entitled to in respect of his counterclaim, as the quantity and value of the articles supplied or the value of the work done has not been shewn. There will, therefore, be a reference to the deputy clerk to ascertain and determine the amount to which defendant is entitled in respect of those portions of his counterclaim which I have held that he is entitled to recover.

Plaintiff will have his costs of the action, but judgment will not be entered for the $229.50 and costs until the amount of the counterclaim is ascertained. Costs of counterclaim reserved.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. SEPTEMBER 14TH, 1905.

TRIAL.

LATIMER v. FONTAINE.

Covenant—Restraint of Trade—Public Policy—Unreasonable Restriction—Covenant not to Engage in any Business in Named Locality.

Plaintiff claimed an injunction restraining defendants from carrying on the business of general merchants in the town of Strathcona for 5 years from the 30th January, 1902, and damages for breach of a covenant to the effect that they would not carry on such business.

On the date referred to the parties entered into the following agreement in writing:—

"The said parties of the first part (defendants) agree to sell and the said party of the first part (plaintiff) agrees to buy the goods of the parties of the first part in their store in Strathcona at and for the price or sum of $733, the receipt of which said sum is hereby acknowledged.

"And the said parties of the first part hereby assign the said goods to the said party of the second part.

"For the period of 5 years from the date of this agreement the said parties of the first part agree that they will not engage in business in the town of Strathcona, and in case of a breach of this clause the said Cleophas Fontaine and Telie Fontaine, for themselves their executors and administrators, undertake to pay the said Albert Edward Latimer the sum of $500 by way of agreed and liquidated damages."

One of the defences relied upon by defendants was that the covenant upon their part contained in this agreement, which was the covenant relied upon by plaintiff, was void upon the ground of public policy.

N. D. Mills, Strathcona, for plaintiff.

N. D. Beck, K.C., for defendants.

SCOTT, J.:—That the covenant is one in restraint of trade is beyond question. It was at one time held that all such

covenants were void as being contrary to public policy, but the present view appears to be that if they are not wider than is reasonably required for the protection of the covenantees they will not be held void upon that ground. See Underwood v. Banker, [1899] 1 Ch. 300, and judgment of Lord Macnaghten in Nordenfeldt v. Nordenfeldt Gun Co., [1894] A. C. at p. 565.

The question, therefore, to be considered is whether the covenant in question is a reasonable one. While I think there cannot be any doubt as to its reasonableness in so far as the extent of the territory to which the restriction is confined is concerned, it is, in my view, unreasonable in restricting defendants from carrying on any business within those limits.

All that was necessary for the protection of the plaintiff and all that he should in reason have required was, that defendants should not carry on any business of the description of that purchased by him from them, viz., that of general merchants or dealers in merchandise.

In Baker v. Hedgcock, 29 Ch. D. 520, defendant contracted to serve plaintiff for 3 years at a stated salary, and also agreed not to leave his service or enter the service or employ of any other person or enter into any engagement or be concerned or interested in carrying on either on his own account or otherwise any business whatsoever within a distance of one mile of a certain place in London or any other place of business of the plaintiff which he then had or thereafter might have during the continuance of the term of service or within 2 years thereafter, without the consent of the plaintiff. It was held that this stipulation was unreasonable, in that it prohibited the defendant from carrying on any business whatever within those limits, and was therefore void. It was also held that the agreement was not divisible, and could not be construed as applying only to the business carried on by the plaintiff, and that to hold otherwise would be to create or carve out a new covenant for the sake of validating an instrument which would otherwise be void.

I cannot see any material distinction between that case and the present. It is true that the words in the contract in that case were "any business whatever," while those used in the present contract are "any business," but, in my view, the latter expression is as wide as the former.

I give judgment for defendant with costs.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. SEPTEMBER 15TH, 1905.

TRIAL.

McDOUGALL v. BULL.

Contract—Delivery of Scrip—Breach—Return of Deposit—Principal and Agent—Authority of Agent—Costs.

Plaintiffs alleged that on 15th February, 1902, they, through their agent one Macnamara, entered into an oral agreement with defendant, whereby the latter agreed to deliver to them certain land scrip for the price of $960; that on the same day Macnamara, as such agent, paid defendant $100 upon account of the purchase money; and that plaintiffs had repeatedly demanded from defendant the delivery of the scrip, but he had neglected to deliver the same. They claimed the return of the $100 and $1,000 damages.

Defendant denied having entered into such agreement, but admitted having entered into an agreement with Macnamara for the sale to him of certain scrip to which one Groat was entitled, and having received $100 from Macnamara on account thereof, but he alleged that it was a condition of the agreement that the $100 so paid was to be returned to Macnamara by him in the event of his not being able to secure the scrip. He also alleged that he was unable to secure the scrip, and that he thereupon returned the $100 to Macnamara, with interest up to the date of repayment; that the same was accepted by Macnamara; that he (defendant) was thereby released from the contract; and that he was not aware at the time the contract was entered into, or at the time of such repayment, that Macnamara was acting as agent for plaintiffs.

N. D. Beck, K.C., for plaintiffs.

C. W. Cross, Edmonton, for defendant.

SCOTT, J.:—I find upon the evidence that Macnamara, acting as agent for plaintiffs, did enter into a contract with defendant by the terms of which defendant agreed to sell the scrip for $960, and that he received $100 on account of the purchase money, but that the contract was subject to a condition that, if defendant was unable to procure the scrip

from one Groat, he was to be at liberty to return the $100 and interest and to be thereby relieved from further performance. I also find that defendant was unable to procure such scrip, and that on 16th December, 1902, he returned to Macnamara $105, being the amount of the deposit and interest thereon.

Plaintiffs have failed to establish that, at the time defendant entered into the agreement with Macnamara, he was aware that the latter was acting in the matter as plaintiffs' agent, but I find that he had notice that such was the case long before the repayment by him to Macnamara of the $100 and interest.

Not only had he notice of this fact, but he also had notice that plaintiffs were demanding from him the fulfilment of his contract by the delivery of the scrip. Such being the case, the repayment of the $100 and interest to Macnamara was not a repayment to plaintiffs, as the former has not been shewn to have been authorized by the latter to receive the same, and defendant could not reasonably presume that any such authority had been given, as prior to such repayment he had notice that plaintiffs had instructed their advocates to take proceedings against him under the contract.

The evidence shews that after the commencement of the action Macnamara had paid over the $105 to plaintiffs' advocates under negotiations for a settlement of the action, which settlement was never arranged, and that the moneys are still in their hands.

I give judgment for plaintiffs for their costs of the action.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. SEPTEMBER 18TH, 1905.

COURT.

HOOPER v. SMITH.

Registry Laws — Land Titles Act — Transferee for Value without Notice of Fraud of Transferor — Injunction—Equities—Priority.

Application by defendant Hamilton to dissolve an interim injunction granted by SCOTT, J., on 26th June, 1905,

restraining him and the registrar of North Alberta registration district from dealing with the lands in question.

O. M. Biggar, Edmonton, for defendant Hamilton.

J. D. Hyndman, Edmonton, for plaintiff.

SCOTT, J.:—By his statement of claim plaintiff alleges that he is a son of the next of kin of William H. Hooper, deceased; that on 21st March, 1902, deceased and defendant Smith entered into an agreement with one MacDonald to purchase from him the lands in question; that the agreement provided that, upon payment of the purchase money, deceased should be entitled to a two-thirds interest and defendant Smith to a one-third interest in the property; that the deceased died on 13th March, 1905; that at that time there remained due to Macdonald a balance on account of the purchase money; that shortly thereafter defendant Smith paid MacDonald the balance of the purchase money, and, in fraud of the creditors and next of kin of deceased, induced MacDonald to transfer said lands to him, and on 1st April, 1905, he became the registered owner of the lands; that on 26th April, 1905, he, for a pretended consideration of $9,000, transferred the lands to his co-defendant, who on 28th April following became the registered owner thereof; that the latter gave the former no consideration for said transfer; and that, at the time of receiving the same, he had notice of the interest of deceased in the lands, and took the transfer for the purpose of enabling defendant Smith to defraud the legal representatives of deceased of their interest therein.

Upon the hearing of the application it was admitted by counsel for defendant Hamilton that at the time he obtained his transfer from Smith he was aware that deceased had an interest in the lands in question.

It was contended by counsel for the applicant that neither upon the application for the injunction nor upon this application is there any suggestion of fraud on the part of defendant Hamilton beyond the fact that at the time he obtained the transfer from Smith he knew that Smith did not own the whole interest in the land; that having obtained his certificate of title he is entitled by virtue of secs. 55 and 57 of the Land Titles Act to hold the lands as against the representatives of deceased, who have no longer any interest therein; and that, under sec. 126 of the Act, his knowledge of the unregistered interest of deceased does not of itself constitute fraud.

In Gregory v. Alger, Hunter's Torrens Title Cases 533, it was held by the Supreme Court of Victoria that, in the absence of fraud on the part of the holder of a certificate of title, his title will prevail over an unregistered interest, even though he had notice of such interest before he obtained his certificate; and that his obtaining the certificate with such notice did not constitute fraud. This was a decision under a section of the Victorian Transfer of Land Act similar to sec. 126 of our Act. It appears, however, that the Courts of New Zealand have taken a different view of the effect of a similar enactment there. See Duffey v. Eagleson, Digest of Australian Land Cases 285, and Locher v. Howland, ib. 114. The question of the effect of such notice is, therefore, not free from doubt.

In the affidavit of defendant Smith filed on this application it is shewn that defendant Hamilton had notice from him of the interest of deceased in the property before he (Smith) had obtained his certificate of title. Such being the case, it is open to question whether defendant Hamilton's certificate of title would protect him against that interest, even though Gregory v. Alger was rightly decided. See Davis v. Weakey, Hunter's Torrens Title Cases 350.

Apart from these questions, there is in the statement of claim a charge of actual fraud on the part of defendant Hamilton. No such actual fraud on his part has been shewn unless his purchasing the land from his co-defendant, knowing that he did not possess the whole interest in it, would constitute such fraud, but plaintiff has sworn to his belief in the existence of such fraud, and its existence is a question to be disposed of at the trial of the action. The fact that the defendants have in their affidavits filed repudiated any fraud on their part would not, I think, justify me in now holding that they were innocent of it, nor would the fact that plaintiff has not proved such fraud at this stage justify me in dissolving the injunction.

In Davis v. Weakey, Molesworth, J., says, with reference to the effect of the section of the Victoria Act similar to sec. 126 of our Act: "The immense power which that Act gives to a proprietor of completely barring clear equities, presents, I think, a reason for Courts of equity readily interfering by injunction."

The application is refused; costs to be costs in cause to plaintiff in any event on final taxation. Defendant Hamil-

ton to be at liberty to again apply to dissolve the injunction in case plaintiff does not proceed to trial at the next sittings at Edmonton.

NORTH-WEST TERRITORIES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. SEPTEMBER 21ST, 1905.

TRIAL.

SAWYER-MASSEY CO. v. FOSTER.

Principal and Surety — Guaranty — Continuing Security— Extent of Obligation — Fraud of Agent of Creditors— Foreign Companies Ordinance—Registration—Penalty— Demand.

Action on a guaranty given by defendant whereby he guaranteed to plaintiffs the due payment by one John McLellan of the purchase price of a traction engine, thresher, and threshing outfit, sold by plaintiffs to McLellan, the guaranty being to the extent of $1,000 only.

The defences were: 1st. That the guaranty was not a continuing one, but was for the first $1,000 only, and more than that amount having been paid by McLellan to plaintiffs, defendant was not liable. 2nd. That defendant was induced to execute the guaranty through the fraud of one G. S. Davidson, the agent of plaintiffs, who represented to him that the agreement guaranteed the payment by McLellan of the first $1,000 only, and that upon payment of that amount by McLellan he (defendant) would be no longer liable. 3rd. That plaintiffs were an unregistered foreign company within the meaning of the Foreign Companies Ordinance of 1903, and therefore incapable of maintaining the action.

N. MacKenzie, Regina, for plaintiffs.

F. Jones. Regina, for defendant.

NEWLANDS, J.:—As to the first defence, the guaranty is too plain to admit of any dispute. Its wording is as follows: "The party of the first part (defendant) hereby guarantees

to the parties of the second part (plaintiffs) the due payment by the said John McLellan of the purchase price of the said machinery, and the due payment of any notes that may be given by the said John McLellan in connection with the said purchase price, but it is expressly understood and agreed that this guaranty is only to be in the sum of $1,000. It is further agreed that should the said McLellan make default in payment of the purchase price of the said machinery, or in payment of any of the notes which may be given by him to the parties of the second part in connection with the said machinery, the party of the first part will forthwith pay to the parties of the second part such sum or sums of money as may then be due and owing by the said McLellan, and which the parties of the second part may demand from the party of the first part, from time to time, until the sum of $1.000 is fully paid or satisfied."

I think under the guaranty defendant is liable until the whole purchase price is paid. He agrees to be liable in case of default in payment of any of the notes given in payment of the purchase money. Nine notes were given; the first 6 only were paid. "Any notes" refers as much to the last as the first. If the parties had intended to restrict the guaranty to the notes given for the first $1,000 of the purchase money, they would have said so and would not have said "any notes." In Laurie v. Scholefield, L. R. 4 C. P. 627, Montague Smith, J., said in referring to a somewhat similar guaranty: "The words 'not exceeding in the whole £1,000,' do not amount to a condition, they were intended to express the limit of the defendant's liability." That, I think, is the case here, and I hold that the guaranty is a continuing one until all the notes given by McLellan for the purchase price of the machinery are paid.

As to the defence that he was induced to execute the guaranty by the fraud of one G. S. Davidson, the agent of plaintiffs, I find there is no evidence of any such fraudulent representation.

The defence that the plaintiffs are a foreign company and not registered under the Foreign Companies Ordinance, 1903, is not one that can be taken in this action, as plaintiffs' cause of action accrued before that Ordinance came into effect.

The Ordinance which was in force at the time the cause of action accrued was ch. 63 of the Consolidated Ordinances.

which does not forbid a foreign company from doing business, but only imposes on them a penalty for so doing. The Ordinance now in force, ch. 14 of 1903, forbids them from doing business unless registered (see 3), and sec. 10 provides that they shall be incapable of maintaining an action in connection with any business carried on without registration contrary to the provisions of sec. 3.

As sec. 3 was not in force at the time the cause of action accrued, I do not think that sec. 10 applies, and therefore plaintiffs are not by that section prohibited from bringing this action.

Plaintiffs made a demand upon defendant on 1st January, 1903, and they are therefore entitled to recover from defendant the sum of $1,000, and interest from that date at 5 per cent. per annum, providing that amount is due. For the purpose of ascertaining the amount due, I refer the case to the clerk. If he finds that more than $1,000 is due from McLellan to plaintiffs, judgment is to be entered as above; if less than that amount, then for the amount found to be due, with costs.

EXCHEQUER COURT OF CANADA.

(YUKON ADMIRALTY DISTRICT.)

CRAIG, LOCAL JUDGE. AUGUST 29TH, 1905.

TRIAL.

PORTEOUS v. THE "LIGHTENING."

Ship—Seamen's Wages—Contract—Correspondence — Desertion—Justification—Transportation Money—Maintenance Money—Action—Costs—Witness Fees.

Action by William Porteous and Bertram Rutherford Bunny for wages and transportation money.

George Black, for plaintiffs.

F. L. Gwillim, for defendant.

CRAIG, J.:—The plaintiffs are seamen engaged as first and second engineers on the ship "Lightening," and were

engaged under the following conditions. The owner of the ship, one Williams, who has some interest as a shareholder in the Dawson Electric Light and Power Company, Limited, used that company to send the following telegram, first, on 26th April to McLellan, Collector of Customs at White Horse: "Send us properly qualified first and second engineers for steamer 'Lightening' if you can. Answer." In reply to that the plaintiff Bunny wired: "State engineers' wages. Will you pay transportation? Reply." In reply to that the Dawson Light Company wired to Bunny: "Pay regular wages. Stand transportation to Dawson if you stay with steamer during season." And in reply to that, on 1st May Bunny wires: "White Pass refuses transportation unless money deposited with Rogers, Dawson. Have you second?" In reply to that the Electric Light Company wired: "Deposited $125 with the White Pass and Yukon Route." Thereupon Bunny came.

In the case of Porteous the same company wired to the Collector of Customs or Engineers' Association at Vancouver: "Send second engineer for steamer 'Lightening' at once, if possible; Dilbert Bleeker preferred. Answer." Thomas Hurd, on behalf of the engineers' association, wired: "Becker engaged. Can send first-class man. Do B. Y. N. Company terms prevail or state terms. Answer." To that a reply was sent by the company: "B. Y. N. rates go. Wire when man starts." And in reply Hurd wired: "Engineer leaves Princess May."

It is admitted that the regular rates and those which governed the B. Y. N. Company, which were referred to in the telegram re Porteous engagement, are a 6 months' engagement and transportation from the outside, $250 per month for first engineer and $166.50 for second engineer. Without the 6 months' engagement, and when hired here in Dawson, the rates are: for first engineer $300 per month and for second $200.

Bunny left White Horse on 4th May and arrived in Dawson on the 12th. He saw Carr, the manager of the Electric Light and Power Company, and apparently, from his actions, manager of Williams's private interests; Williams owning a coal mine some 50 miles from Dawson, and the steamer "Lightening" being employed solely in freighting coal from the mine to Dawson and mainly to the works of the Electric Light Company. When Bunny saw Carr, Carr said the wages

would be $300 per month. Carr took Bunny down to the boat and introduced him to the pilot, when he went to work. There was then a conversation regarding the B. Y. N. contract, which would vary the terms of $300 per month to the extent already mentioned. Carr said that on the return trip he would get the B. Y. N. contract if all right; he would have the contract prepared. Bunny called upon him again with Porteous, and Carr stated that the contract would be on board the ship that night to be signed before they sailed on the second trip down the river. It was not there. On 15th June they came back to Dawson on the return trip. Williams then promised to sign the contract at 2 p.m. on the 16th. The men called at that hour at the office. Williams, the owner, said he hadn't had time to study the contract, and asked them to return at 8 p.m., which they did. The contract was then ready. It had been prepared by the owner's solicitors and was in Williams's hands. When they returned at 8 p.m. they met Carr and Williams going out, and they were told to come back next day. They came back and asked for pay and the contract. Williams went in to his inner room, apparently to study and sign the contract, if satisfactory. They waited outside for 15 minutes or thereabouts, when Carr, the manager, entered Williams's inner office and found Williams had gone out, and returning, Carr said: "I cannot see why he does not sign the contract or refuse to sign it." Williams was then outside of the office. They returned again on the 17th and they asked for pay. Williams told Carr to write out two cheques and receipts, which was done. The receipts, as first drawn out (and there is no denial of this), were drawn upon the basis of the contract, that is, the first engineer to receive $250 per month and the second engineer $166.50. These receipts the men refused to sign unless the contract was signed, and the receipts or vouchers were altered to read "on account of wages and subject to agreement." There is no doubt that the men were quite willing to accept, the first engineer $250, and the second $166.50, upon the terms of a 6 months' hiring, and the other terms as provided for by the first understood and accepted contract governing the B. Y. N. Company. When these men refused to sign the receipts as drawn up, without a contract, Williams lost his temper and seized the cheques and dashed them down on the table and asked them "what the hell they wanted." The manager then spoke up and said that Bunny was right, and the receipts were altered as I have stated, and the cheques were given.

They then inquired again about their contracts or upon what terms they were working. Then Williams said: "You go back and set the valves" (referring to certain sheaves or valves which were out of place on the machinery.) Bunny said he was "sick of the whole outfit" and would not go back under existing conditions. But he and the second engineer went and tried to fix the sheaves. A great deal of evidence was given about these sheaves, but the only expert evidence was that of the chief engineer and of the second engineer. It was in evidence that after they left the sheaves were fixed in a very short time, but the plaintiffs stated positively that those sheaves could not be fixed unless the boat was in still water and the wheel stationary, and that they never had sufficient time or opportunity to properly attend to this matter; they did all they could in the time at their disposal; other matters of greater emergency required their attention. No experts were called to shew incompetency on the part of these men, and I cannot from the evidence find that there was any incompetency. They went back. Williams told them to get up steam to leave on the 18th at 1 p.m. Steam was got up, but before this both men had gone to the bank to have their cheques cashed. Bunny presented his first, and there were funds there to pay his, but on Porteous presenting his cheque he was refused for want of funds. They saw Williams the following morning—Sunday the 18th—and another discussion arose. What exactly took place it is hard to say, but there is no doubt about this, that they were finding fault about the non-payment of the cheque and the generally unsatisfactory state of affairs under which they were working, and that Williams then said: "Come back to the office and I will sign the contract." There is no doubt he said this because both Bunny and Porteous swear to it, and Yates, the purser of the boat, was present and heard words to the same effect. Now it appears that the contract is produced, signed by Williams. He says he signed it on Saturday night. He does not explain why he said, "Come back (on Sunday) and I will sign the contract," if it had been already signed, but there appears to have been considerable bad temper on both sides. No witness saw Williams sign the contract on Saturday night, and it is now produced with the signature attached. Bunny and Porteous took objection to signing on Sunday, saying it would be illegal to sign on that day, and Williams made no offer to sign on any other day but Sunday, nor did he state then that he had signed it the night before. If he had so

stated Yates would have heard it. Porteous was told to come to the office at 12.30, and Williams would give him pay for his cheque. He came there, and pay was not forthcoming. Williams asked Porteous to take the ship out as first engineer. Porteous, not being certain of his position and his rights under the Canadian laws to take out the ship as first engineer, refused and gave notice of leaving, and both the men, after taking their lunch on board the boat that day, left the ship. Williams now refuses to pay on the ground of desertion.

Referring first to Bunny's case, there was a complete contract with him for regular wages, which, by the consensus of all parties, means $300 per month on an indefinite hiring and $250 on the B. Y. N. contract, with transportation charges. There being no contract signed, there was a complete contract to pay Bunny $300 per month and transportation if he remained with the steamer during the season. In the Porteous case there was a contract under the B. Y. N. terms. Something was said as to the word "rates" being used in the telegram of 1st May in reply to the question—"Do B. Y. N. terms prevail?"—the answer being—"B. Y. N. rates go." While, I take it, the rates would mean the rates as affected by the contract and by the whole contract, the rates without the contract would be $200; the rates with a contract would be $166.50 and the other terms. I take it that Porteous came here under that kind of a contract. Williams's defence of incompetency has not been established, as I have already said. A great deal of evidence was given about the length of time the boat took to come up from Coal Creek while these men were engineers on board of her, but they explain that in various ways which I need not here detail. I was not at all satisfied that owing to any default on their part or to any incompetency on their part as engineers, the trips were longer at that time than they were afterwards. At all events that was not used as an excuse for Williams refusing to sign the contracts or to give the men the definite terms upon which they were working. It is said there was no excuse for the men leaving the ship. Perhaps in a certain sense that may be true, that the men might have gone on working in that indefinite kind of way without the contract. But Williams's conduct certainly was quite sufficient to make the men suspicious of his fairness and candour with them. He should either have signed the contract or said—"No, you are hired on the

other terms of an indefinite hiring." He evidently wished to get them on the lower terms of hiring, at the same time not to bind himself by a contract for 6 months. There can be no other conclusion from his conduct. It is not denied at all that all these various interviews took place. Carr to a very great extent confirms Bunny and Porteous in their statements, and Williams says he cannot remember but does not deny that the men came back and forth often to ascertain exactly on what terms they were working. Then the non-payment of Porteous's cheque was suspicious. It may or may not have been an accident, but seamen have a right to be paid promptly; in fact the law affecting seamen is very strict upon that matter. While I think the men might have kept on working, and the trouble have been gotten over afterwards, yet I think there was sufficient justification for their being suspicious and leaving the boat. They did not desert when on a voyage. This steamer is one making short trips of two or three days, and the men are not hired by the voyage as upon the sea or coming from St. Michael's here, for example; but they are hired by the month or for the season of navigation. Williams seemed to be quite willing that they should leave the boat if they got other men in their places. They tried to do so and the boat was delayed 24 hours until other men were employed.

In Porteous's case there will be judgment for the full amount of his wages and transportation based upon the B. Y. N. contract; that is, his wages will run from the time he left Vancouver until 18th June. Bunny will receive wages at $300 per month from the time he left White Horse until 18th June, but, as he did not remain with the ship during the whole season, he will only be entitled to a proportionate part of the transportation, that is, 48-300, and he must allow on his wages the balance of transportation. I will not allow maintenance during suit in either case, and there will be the ordinary costs of the action. Bunny will get no separate costs of suit or witness fees. Porteous will be allowed witness fees.

YUKON TERRITORY.

CRAIG, J. SEPTEMBER 2ND, 1905.

TRIAL.

DAY v. KLONDIKE MINES R. W. CO.

Railway — Expropriation of Lands — Orders in Council — Board of Railway Commissioners — Railway Act—Rights of Placer Miners — Open Mines — Deposit of Waste — Licenses—Renewal—Plan of Line of Railway—Omission to File—Injunction—Compensation—Jurisdiction of Territorial Court—Remedy—Arbitration.

Action by Albert H. Day against the Klondike Mines R. W. Co., the Dawson, Grand Forks, and Stewart River R. W. Corporation, and Jérome A. Chute, and 6 other actions by different plaintiffs against the same defendants.

H. E. Ridley, for plaintiffs Day, Treadgold, and Boyle.

Frank J. Stacpoole, for plaintiffs Hamilton and N. A. T. & T. Co.

George Black, for plaintiff McDonald.

R. L. Ashbaugh, for defendants.

CRAIG, J.:—The defendants the Klondike Mines Railway Company are a company incorporated under ch. 72 of 62 & 63 Vict., empowering them to build a railway from Dawson City up the valley of Bonanza and on in the route laid down in the Act, and, as is usual, the Railway Act applies to the company; and Chute is the contractor to build the railway.

The standing of the other defendants is not very clearly defined either by themselves or by the plaintiffs. However, that little affects the judgment.

Two orders in council have been submitted to me upon this matter, which refer to other orders which have not been submitted. The first order in council is one of 4th September, 1900, which refers to a memorandum of 27th August, 1900, not produced. This order in council recites that "under the new plans proposed to be filed it is intended to

locate the line of railway on the higher ground so as to avoid interference with creek claims upon Bonanza and Eldorado and other creeks." These are the creeks, I may say, up which the railway will run. The order in council further goes on to state that "the Minister is of the opinion that everything should be done to facilitate the early construction of the said line of railway," and further recommends that "the said railway company be granted the right to enter upon and occupy Crown lands which may be found necessary for the proposed construction of their works, the right of way not to exceed 60 feet except where a larger amount is required for station grounds and other railway purposes. The railway company shall be required in all cases where a mining claim is entered upon or occupied to compensate the owner or beneficiary of such claim for actual damage only caused to such owner or beneficiary upon occupation of such claim by the railway company, such damages to be assessed in the manner provided by the Railway Act. The right of way herein provided for and authorized shall not be acted upon, nor shall any Crown lands or mining claim be entered upon by the railway company unless and until complete plans of the railway company's proposed line shall have been filed and approved by the Minister of the Interior."

No operation was commenced in the way of construction of the road until the spring of this year or last autumn; but the matter in dispute in this action had not become acute until the railway company attempted to cross some mining claims in operation or intended to be operated in the future.

By order in council of 7th January, 1905, referring to a memorandum of 3rd December, 1904, not produced, it was recited that authority was given for entering into a contract with the railway company for the construction, under a subsidy granted in 1903, of the railway in question. The time was extended until 1st January, 1905. And there is a further recommendation that "Now that the company have furished the necessary details, the contract to be entered into with them under the said order in council be based on the general terms and conditions for subsidies granted by the Subsidy Act fixing grades and curvatures." "Further recommends that the route indicated by a full red line on a route map shewing the proposed line of railway from Klondike and Dawson City, via Grand Forks, to the Stewart River, 84 miles, copies of which are hereto attached, be approved accordingly." "Further recommends that the location indicated by the said plan and

profile from Dawson City, a distance of about 12 miles, be approved accordingly." The plan filed, and which is produced and admitted to be the one referred to in this order in council, is not a plan in accordance with the Railway Act and one which should be filed before the compulsory clauses of the Railway Act are enforced against resisting owners. The plan is no more than a general route plan. It does not give nor describe the particular properties which the line crosses by their boundaries nor the names of owners; and the reference book contains no descriptions or quantities whatever. It is a plan in no respect complying with the provisions of the Railway Act and necessary to be filed before compulsory expropriation of lands takes place. It strikes me as being such a map as is referred to in sub-sec. 1 of sec. 122; not the plan referred to in sub-sec. 5 of the same section. However, such a plan as it was, it was not filed with the registrar of deeds in this Territory, as is required by the Act.

It is contended that this plan having been approved by the Board of Railway Commissioners of Canada and by the Minister of the Interior, no further question can arise upon its validity or its compliance or non-compliance with the Railway Act; that such approval overrides the provisions of the Railway Act. By a letter from the Minister of the Interior of 18th January, 1902, this plan is recited as having been certified and approved by the Deputy Minister of Railways and Canals, filed in the Department of the Interior, approved by the Honourable James H. Ross, Commissioner of the Yukon Territory and approved by the Minister. The letter is to the solicitor of the company, and promises upon completion of each section of the line that letters patent will be issued to the railway company of the land required so far as the same is vested in the Crown, and provided the conditions of the annexed order in council shall have been in the meantime complied with. The annexed order in council has not been produced to me. This letter of approval provides that " when it is found necessary to make any deviation in the line of railway at one or more points along the line, as now shewn by the plans before referred to, because of obstacles, the same shall be considered the true and correct right of way and be dealt with in the issue of patents as heretofore mentioned as if the deviation or deviations formed part of the line as shewn by the present plans, and so soon as satisfactory corrected plans and profiles of that part of the line in which such deviation or deviations shall have been made have been

filed in the Department of Railways and Canals and in the Department of the Interior and approved by the Deputy Minister of Railways and Canals, patents will issue for the lands covered by the deviation." The final clause of the letter recites that "it is in the public interest that everything possible and proper shall be done to facilitate the early construction of the road, and the Minister authorizes the company to enter upon any Crown lands crossed by the line of railway as shewn by the said plans for the purpose of constructing the said railway;" the general contention of the railway company being that the railway crosses placer mining claims which are not owned by the placer miners who hold licenses under the placer mining regulations; that all the miners are entitled to is the right to extract the gold from the ground in the first place; that they have no surface rights whatever; that these surface rights remain in the Crown and can be disposed of by the Crown by order in council on the recommendation of the Minister of the Interior under sec. 47 of the Dominion Lands Act. They further contend that the placer miner is only entitled to hold his ground for one year after the issue of his license or grant, and that on the expiration of a year, if in the meantime the Crown has, by the Minister of the Interior or by order in council, granted to any person any rights over these claims, then the miners having the rights of renewal take that renewal subject to such grants and rights as the Minister of the Interior has seen fit to impose upon the lands. It is contended, under the authority of Chappelle v. The King, 32 S.C.R. 586, and carried on appeal to His Majesty's Privy Council (the judgment of which Court I have, of 2nd December, 1903), that the placer miner has no right of renewal. By this judgment it was held that the placer miner has no right of renewal in his claim; it is by the grace of the Crown that he obtains his renewal; and that he has no absolute right to any such renewal. The words of the judgment of the Privy Council are: "Their Lordships, therefore, are of opinion that the placer miner, on renewal, holds under an annual grant in substitution for but not in continuation of his original grant; he has no absolute right to renewal; he has no doubt a preferential right of renewal, because no interloper can be in a position to make the affidavit required to entitle him to a grant of the claim so long as the original occupant complies with the requirements of his grant and applies in due time for renewal." The judgment further decides that the miner takes his renewal subject

to all changes in the regulations; that he does not hold his license under the regulations existing at the time he obtained his original grant. The regulations at the time this judgment was pronounced differ slightly from the regulations in force to-day or in force when the orders in council affecting this railway company were passed. That judgment was pronounced under the regulations of 1889, and by sec. 20 of those regulations it is provided that "the entry of every holder of a grant for placer mining must be renewed and his receipt relinquished and replaced every year, the entry fee being paid each time." The form of grant provided for by the regulations of that date differs very slightly, if at all, from the form in force to-day. It is a grant for a year subject to the regulations. The regulations to-day, however, are different in this respect, the law now being that a free miner, having duly located and recorded a claim, "shall be entitled to hold it for the period for which he received entry and thence from year to year by recording the same." The section further goes on to provide for representation work, which keeps the claim alive. Under sec. 34 of the present placer regulations it is provided that "a free miner may obtain entry for one or five years." Then sec. 41 (a) is a decided alteration of the old law, because it provides for entry for the period for which the free miner received entry, which may be one or five years, "and thence from year to year by re-recording the same." These words must mean something, and the natural meaning is that a free miner, duly observing the regulations and performing the work which he is required to perform under this section and sub-section, is entitled to a renewal from year to year by re-recording. It is true that the former regulations, under which Chappelle v. The King was decided, provided for renewal, and it may be that the words now used in the present regulations have no greater or stronger force than the provisions of the former regulations. But, apart from the view which I entertain on this matter, that the miner has a right now of renewal which the Crown recognizes under the very order in council which the railway company invoke as the authority for the powers which they propose to exercise over these lands, direct provision is made for compensation of the miners. The order in council indicates also that the rights of the miners were in the contemplation of the Minister and of the government when the orders in council were passed; that it was contemplated at that time that the road should run upon the higher levels and

not cross the low-lying portion of the valley in which the more valuable placer deposits existed.

As I have already stated, no proper plan under the Act has been prepared or filed, and no plan at all for deposit in this district until long after the railway had commenced its construction and until after these actions were instituted.

The plaintiffs now ask for an injunction to restrain the defendants from proceeding with the construction of their work upon several grounds, the main ground being that they have not complied with the Railway Act in not filing proper plans and book of reference; secondly, that they are crossing open mines now in operation and injuriously affecting the working of those mines; that they have not offered compensation; that they wilfully obstructed plaintiffs in obtaining any information as to the railway company's powers, and (this is sworn to and not denied) that plaintiffs on several occasions, by their solicitors, asked for copies of these orders in council, asked for information respecting the plans, route of the railway, the lands to be taken, and the powers intended to be exercised by the company, but were absolutely refused any information whatever upon these points. It is also in evidence that the engineer for the railway company could not ascertain from the map of the company, which was approved by the Minister, where any particular piece of property lay, but that in one instance he had to resort to the plan prepared by the engineer for plaintiffs. It is quite evident to any one that an owner could not from a perusal of the plan now on file, and which was the plan under which the company were working, ascertain for himself what portion of his mining claim was being taken or what powers the company intended to exercise in respect to it. The railway company take the broad ground that they are not subject to the provisions of the Railway Act, either in the matter of compensation for the lands taken or with reference to the provisions of the Act requiring these plans and profiles to be prepared and filed. As to the preparing and filing of the plans, I think the railway company are bound by the Railway Act in regard to this matter. I do not think that any order in council can override a direct provision of the Act of Parliament in this respect, and I do not think that the order in council intended to override the Act of Parliament. For authority upon these points I would refer to the case of Murphy v. Kingston and Pembroke R. W. Co., 11 O. R. 302; also to the same case as reported in 17 S. C. R. 582; also to the case of Brooke v. Toronto Belt Line R. W.

Co., 21 O. R. 401. I am, therefore, of opinion that before a railway company or this railway company can expropriate lands without the consent of the owners, they must file proper plans provided for by the Railway Act.

It is contended that the placer miners are not owners within the meaning of the Railway Act, and are not entitled to notice. I do not think that this contention can be maintained. As to who is the owner I would refer to Stewart v. Ottawa and New York R. W. Co., 30 O. R. 599. There it was held that the person in possession even under a defective title must be dealt with in the meantime as the owner; that the company cannot even in the case of a defective title ignore the person who actually occupies the land. The owner is defined by the Railway Act as "any person who is enabled to sell and convey the land." And it is argued that the placer miner not being able to convey is therefore not an owner within the meaning of the Railway Act. The placer mining regulations empower the claim owner to sell, convey, and mortgage his claim. It is true he can convey no interest in the surface beyond what the placer regulations give him. But these he can convey. What the rights of a placer owner are in the surafce I have already decided in the case of Peterson v. Louden, decided in August, 1901, in this Court, where I held (and that judgment has not been disturbed so far) that "the placer miner had such rights in the surface as he needed in order to wrest from the soil all the placer gold lying in it;" that how far he could use the surface was entirely dependent upon the nature of the mineral to be won from the soil and from the nature of the operations which he would have to carry on to wrest the gold or mineral from the soil. Placer mining operations are carried on in diverse ways in this country; by sinking shafts and from the shafts drifting or tunnelling underneath the soil and hoisting the pay dirt to the surface; by open cuts where the entire surface of the soil is broken up and the whole of the ground is either washed away or put through sluice boxes; by hydraulics and by dredging; and I am of opinion that the Crown intends by its grant to give to the miner such use of the surface as is needed in carrying on those various operations in the most economical and miner-like manner, and if necessary that the whole surface of the soil should be disturbed and put through water, then the miner has the right to so use the surface. Therefore, I think that the miner has a very well defined and real interest in the surface of his mining claim, such an interest

it to extract the mineral from the soil either by open cut, ground sluicing, hydraulizing or drifting or dredging. These open mines affected by the crossing of the railway company are placer mines, part of them being worked out and part still remaining to be worked. Compensation will cover all damages. How much the compensation shall be is not for me to determine now; I mean how far the compensation shall go. If the miner is restrained from operating his mine within 40 yards of the railway right of way, then his mine is rendered useless. The miner each year must do $200 worth of work on his claim to keep it alive, and it might happen that 40 yards on each side of the track would take in the entire valuable ground, in fact, the entire claim, depending wholly upon the nature of the ground. Compensation might involve payment for the entire claim and its contents and appurtenances. The company cannot operate these mines themselves, because sub-sec. 2 of sec. 132 provides that they shall not be entitled to the mines or ores. How far they might be entitled to operate them if they obtained them by purchase and obtained the whole of the ground, I will not pretend to determine. The difficulty is to allow a railway to be constructed up this valley and to conform to the Railway Act in respect to both these sections. The Act is positive in its provisions—"The railway shall not, without the authority of the Board, locate its line so as to injuriously affect the working of an open mine." The line affects the open mine in two ways, first, it prevents the extraction of the mineral from the placer ground; it also prevents the use of the balance of the claim already worked out, for the deposit of tailings. The first damage might be fully compensated for by payment; the second it is almost impossible to estimate. And a very serious question of law arises,—whether a miner has any right at all to deposit tailings upon the balance of his claim which is worked out, except such tailings as are taken from the very claim itself, which he is operating, or whether he has the right to acquire a claim under the placer regulations for a dumping ground, I very much doubt. In one of the cases before me, namely, the case of Day, the miner is using the creek claim, or the part of it worked out, for the deposit of tailings from hillsides or bench claims adjoining.

The railway company contend that without the fee from the Crown he has no right to use the ground for any such purpose. His license allows him only to extract the gold and to make such use of the ground as is necessary for extracting

the gold from the particular claim which his license covers, and that once the gold is extracted, his right to that claim ceases, and that the claim cannot be used for any other purpose and particularly not used for the purpose of depositing debris, deads, or waste from other claims. That is a very serious question of law, which I will not pretend to determine now without further argument and further authority. I can only say that the argument is a strong one and strikes me as having very great force. This question of tailings is a serious one in this country any way, and would be most serious if miners were allowed to throw their waste over unused government lands so as to obstruct the building of a railway over those government lands.

As to the claims not being worked I have less difficulty. I think the Crown has a right to grant to the company the right to cross these claims and that the miner must resort to the Railway Board for leave to operate after the crossing. The difficulty of fixing compensation afterwards I have nothing whatever to do with now. It remains then for me to determine what I should do in the present instances. The plaintiffs urge that the company, not having complied with the Railway Act up to this time, must be restrained and the injunctions must stand. The company contend that the Court has no right to issue an injunction; that the sole remedy of these people was by arbitration under the Railway Act. I think that the Court has a right to enjoin the railway company, and for authority I would cite Yale Hotel Co. v. Vancouver and Victoria, 3 Canadian Railway Cases 108. There are other authorities, some of which I have already cited, to the same effect. I think the Court has clearly power to enjoin the railway company when proceeding to take lands without the consent of the owner and not having complied with the provisions of the Railway Act.

As to the open mines, namely, the property of McDonald and Day and the N. A. T. & T. Co., the injunction will stand in the meantime until further evidence is given as to how far the crossing of the road will injuriously affect future operations, and I would suggest in this connection that, as the engineer for the Railway Board is now in the country—has indeed, as I understand, come on a special mission in regard to this very railway—his report on the matter might be presented to me, and I shall then determine whether the injunctions in respect to these claims will stand or not.

As to the other claims, as soon as the railway company file a proper plan under the Act and serve their notice of expropriation and settle the compensation, the injunctions will be removed, and the matter will stand in that condition in the meantime.

It is urged that the season is advancing and the railway company need to proceed speedily, as during our winter months, which are coming on soon, no operations can be gone on with, and the contractor is under a large pecuniary penalty for non-fulfilment of his contract. In this connection I may say that the railway company should have thought of this sooner; but the provisions of the Railway Act are open to them, and if they can shew me that speed is required, upon complying with the Railway Act as to deposit of a sum to cover compensation, after arbitrators have been appointed and have viewed the ground, I will consider favourably any application to remove the injunction to enable the company to continue building the road where needed this autumn.

All questions of costs will be reserved.

Since writing this judgment I have seen the engineer for the Board of Railway Commissioners, and he reports to me that there is some intention of changing the line so as to avoid open claims, and if so, the matter can be mentioned again. My own impression was (and it is confirmed by the report of the engineer) that the line will not injuriously affect the working of the N. A. T. and T. Company claim, although it is in operation; and the general order will apply to it.

All other questions, as well as costs, are reserved, to be mentioned again.

YUKON TERRITORY.

CRAIG, J. SEPTEMBER 14TH, 1905.

CHAMBERS.

BROWNLEE v. EADS.

Judgment Debtor — Examination of—Judgment Summons—Issue of Second Summons while first Pending—Necessity for Special Motion.

Motion by defendant to set aside a judgment summons.

R. L. Ashbaugh, for defendant.

Frank J. McDougal, for plaintiff.

CRAIG, J.:—The judgment summons was issued under ch. 6 of the Ordinances of 1904, which is an Ordinance respecting the collecting of debts. This is a very short Ordinance and not very ample in its provisions respecting the matter with which it deals; but it enacts shortly this (sec. 3): "Any party having an unsatisfied judgment may procure from the clerk a judgment summons in the form No. 1 in the schedule to this Ordinance, requiring the debtor to appear to be examined upon oath touching his estate and effects," and so on, and providing that upon the return of the summons, if the party does not attend or attends and refuses to be sworn, or if upon the examination it appears to the Judge that the debt was fraudulently contracted or credit obtained under false pretence or contracted without reasonable expectation of repayment, or under any other fraudulent circumstances occurring in connection with the contracting of the debt, or the debtor has made any fraudulent gift of his property, and, in cases of tort, including libel and slander, the Judge may order such party to be committed to the common gaol for any period not exceeding one year, and if it appears upon the examination that the party is possessed of means, then the Judge may make an order for payment by instalments.

This is a very drastic enactment, and the liberty of the subject is involved in the enforcement of it. The term of imprisonment may be a year.

The facts under this motion are these. In January of this year a summons under the enactment referred to was issued for the examination of the defendant debtor. He was called and examined, and, it appears, examined fully, before Mr. Justice Dugas, who suggested that, as the defendant was then unable to pay, the examination should be adjourned till 1st April, saying that the defendant might then be able to pay. On 1st April defendant appeared and reported himself to the clerk of the Court for further examination, but the Judge happened to be absent, and defendant went away without being examined. On 1st September another summons was obtained, and the debtor appeared for examination on 7th September, when objection was taken before Mr. Justice Dugas, who was to take the examination, that a second summons could not issue. Mr. Justice Dugas adjourned the examination to enable defendant to move to set aside the summons, and it comes before me to dispose of upon the motion allowed to be made.

The argument of counsel for defendant is, that the statute provides for one summons and one summons only; that the issue of a second summons for the examination of a debtor who has once been examined is an abuse of the process of the Court; that he was examined fully and full disclosure made in January, and no order was made; that that summons is still undisposed of, and a second summons cannot issue so long as that summons is outstanding.

I think the objection is well taken and that the summons must be discharged. Our enactment does not provide for the issue of a second summons, and I will not undertake now upon this motion to decide the question of whether, upon sufficient grounds being shewn, a second summons might not issue for re-examination of the judgment debtor. The judgment creditor is, prima facie, entitled to the summons for the examination of the debtor, and the onus is always upon the defendant to shew that the issue of the summons is an abuse of the process of the Court. If defendant could shew no necessity for the issue of the summons, even in the first instance, I take it that the Court would set aside the summons; if it was clearly an abuse and clearly a vexatious procedure, then, even in the first instance, upon defendant shewing that, the summons would be set aside, and on this point I would refer to Grant v. Cook, 17 P. R. 362. Under the Ontario Division Courts Act, sec. 239, it is provided that where a party has been examined once, no further summons shall issue at the suit of the same or any other creditor without satisfying the Judge that the party has not then made full disclosure or that since the examination the party has acquired the means of paying. This specific enactment clears up the matter in that province. We have no such enactment here, and I think this case would come under the authority of Re Central Bank of Canada, Watson's Case, 15 P. R. 427. In that case the examination of the judgment debtor was in aid of execution under the old Rule 926, now Rule 900, of the Judicature Act, and there, in the cases under that Rule, it was held that the execution creditor has a prima facie right to the order, but if once examined, no second examination of the debtor can take place except upon very strong special grounds being shewn to justify the order, and while the appointment to examine in the first instance may issue ex parte, yet that no second order for examination may be taken out without cause shewn. On a motion under the Judicature Rule of Ontario the material to justify the issue of the order

should be such material as would justify the issue of the second order under the Division Court Rule of Ontario, and perhaps would require to be stronger. See also the case of London and Canadian Loan and Agency Co. v. Merritt, 2 C. L. T. 260. If the defendant can be examined once, there is nothing to prevent him being examined a hundred times. Twice without cause is certainly vexatious; if full examination is had, full disclosure made, why should a man be harassed by being a second time brought up on the same matter. The thing is really res adjudicata. Trial is had, provided by the statute, of the debtor as to his means and the other matters upon which he may be examined. It is an extreme remedy provided by the Act and extreme penalties are imposed upon the debtor dependent upon the result of his examination. On both grounds, that is, on the ground that the former summons is still current and has not been disposed of, and on the ground that no second summons can issue, as has issued in this case, without a special motion, I would allow the motion with costs.

I will not decide yet and do not wish to be taken as having expressed any opinion on the question of whether under our Ordinance a second summons can issue at all or not.

YUKON TERRITORY.

CRAIG, J. SEPTEMBER 19TH, 1905.

CHAMBERS.

KLONDIKE GOVERNMENT CONCESSION LIMITED v. McDONALD.

Mines and Minerals — Water Rights — Diversion of Water — Hydraulic Concession — Choking Stream with Debris — Injunction.

Motion by plaintiffs for an interim injunction.

H. E. Ridley and C. W. C. Tabor, for plaintiffs.

A. Noel, for defendant.

CRAIG, J.:—Plaintiffs are the owners of what is known as a hydraulic concession or lease on the Hunker creek, extending for some distance up and down the valley of the

creek. The defendant is the owner of a hillside claim abutting upon the concession of plaintiffs. The defendant, by a grant under the water regulations, draws from Hunker creek, at a point above the present operations of plaintiffs, 200 inches of water, which he takes through a dam and flume to his pumping house, which is situate almost entirely upon the concession property, thence pumping the water to the hill and using it for hydraulic purposes on the hillside and benches. Plaintiffs attempted to divert the water at a point above defendant's intake dam, and upon that an action was brought by this defendant to restrain that diversion of water.

As the rights of the parties to the water of Hunker creek are now in litigation, the Gold Commissioner has decided that under sec. 10 of the hydraulic regulations of 1898, the holder of a hydraulic lease, as distinguished from the holder of a placer claim, has no more rights in the water of a creek flowing through his concession than an ordinary placer miner has, and is subject to all the restrictions imposed by the water regulations of 3rd August, 1898; that is, that the holding of an hydraulic lease gives no more right to water than the holding of any other mining claim, not excepting the holding of hillside or bench claims, and that such an hydraulic operator must apply in the ordinary way under the water regulations for his grant. I mention this incidentally because it relates somewhat to this motion.

This matter is now in appeal, plaintiffs contending that by virtue of their hydraulic lease they are entitled to the water of the creek as against the hillside owners, who obtained a grant through the water regulations.

Defendant, in his operations on the hillside, pumps a large quantity of water, and thereby sluices on to the ground below a great amount of dead matter, debris and tailings and such like, which fill up the creek, and which, plaintiffs contend, interfere with their operations. Upon this they have taken action, and an injunction has been granted restraining defendant from depositing tailings in the creek bed upon the concession ground. In another action also an injunction was granted restraining plaintiffs from damming up the water of Hunker creek below the power house of the defendant, and thereby flooding his pumping works. Subsequent to all these proceedings this action was brought for the purpose of restraining defendant from going on to plaintiffs' ground and by force with a large body of men with hydraulic nozzles driving the debris, tailings, and sediment further down the

stream on to the land of plaintiffs. Several injunctions have been issued. The Gold Commissioner, under his powers as such, has issued an injunction to prevent the diversion of Hunker creek from the dam above the power house. He has issued an injunction to restrain plaintiffs in that action from damming up the water at a point 150 feet below the power house, and has, in addition, given a mandatory injunction to compel the removal of that dam. While that injunction was in force plaintiffs in this action (the concession company) erected a dam 550 feet down the stream from the power house, which they call a screening dam, to prevent the passage of sediment and tailings down on to their workings below, contending that such material enters into their workings, being dirty and full of refuse matter and hindering their operations. Defendant in this action contends that the erection of that dam is within the mischief provided against by the former injunction against the upper dam 150 feet below the power house, which has the effect of backing water on to their power house as the former dam did. While this motion was pending before me for an injunction to restrain defendant from washing these tailings further down the stream, defendant applied to the Gold Commissioner for an auxiliary injunction, if one may use that expression, to compel the removal of the lower dam erected by plaintiffs, apparently without notice to the Gold Commissioner that the very matter which he was determining was in adjudication before this Court. The Gold Commissioner did grant the auxiliary injunction, but upon the matter being brought to his attention he went on to the ground and gave a further judgment in which he says that he cannot find that the lower dam is within the mischief provided against by his former judgment, and he confines his injunction to the first object which it had in view, namely, the removal of the obstruction 150 feet below the power house and the dam there erected. Now defendant contends that plaintiffs, vexatiously and with intent to prevent defendant from obtaining the benefit of his former action and injunction, are keeping on working below and maintaining this screening dam, which has the very same effect as the former dam. I cannot from the evidence determine that the dam below is backing water on to the power house. There is a fall in the creek there more than sufficient to provide for a flow of water, and the dam is not high enough to back the water that far unless, as is contended by

Mr. Noel, counsel for defendant, the action of the sediment on the bottom of the stream creates a different condition. That is only his argument. I have no evidence to convince me that it is so as a fact. There is this important feature of this case to be considered, that an injunction is now in force preventing the defendant from depositing tailings in the creek. Those were the tailings which came down the hillside from the workings on the hill. He finds that those tailings which he himself has deposited (and this is not denied, but admitted), are interfering with his workings, and he wishes to force them further down the creek. They have been restrained from depositing them at one point. Why should they continue their operations and simply land them at a point lower down where plaintiffs say they will do more damage? They have gone on to what is admittedly plaintiffs' land by force, and are by force of water and men driving or sluicing the tailings at a point further down the creek, where, plaintiffs say, they do them harm. I do not think defendant has any right in defiance of that injunction, while not technically or strictly within the prohibition of that injunction, to go on and do what is practically the same thing by lifting the tailings from the point where they were deposited in the first instance, and against which the injunction provided, and moving them to another point always upon plaintiffs' ground. They contend for the right of the flow of the water to move their sediment. How much or how little right they have I need not determine in this case. This is a serious question,—how far miners in this country are entitled to the natural flow of the water to carry matter in suspension which will deposit on the properties of parties further down the creek than themselves. That matter I am considering in a case which I have heard for the last seven days and have not yet determined. But that is a very different matter from going on with hydraulic nozzles and a gang of men and forcing heavy material from the point of deposit to a point further down the stream. I think they must be restrained from that, pending the result of all these actions and the final adjudication of the rights of the parties in the water in that stream.

Since the hearing of this motion an affidavit has been filed shewing that the plaintiff company have been diverting the water from Hunker creek at a point below the intake dam, but in such a manner as to prevent the free flow of the water or sediment down the creek. It is said that pending the disposal of this motion I warned all parties to keep things in

statu quo. What I meant was that things should remain in statu quo regarding the dams and the main bed of the creek. Whether this diversion affects the matter or not I cannot say, but I think it would have been much better for plaintiffs to have left the creek as it was. The mischief which defendant complains about was not in contemplation by me when I made the direction that things remain in statu quo, and the injunction order will not issue if plaintiffs continue the diversion of the water complained of in that last affidavit. They must restore the creek as it was when this motion was first launched, and my injunction will simply relate to the actions complained of by the entry upon the land of plaintiffs and forcing the debris and dead matter down the stream with hydraulic appliances and men, etc.

The costs will be reserved.

YUKON TERRITORY.

CRAIG, J. SEPTEMBER 19TH. 1905.

CHAMBERS.

REX v. CAMPBELL.

Mandamus—Court Stenographer—Copy of Evidence Taken at Criminal Trial—Allegation that Copy Furnished Incomplete.

Motion by defendant Campbell for a mandamus to J. Almon Valiquette, court stenographer, to compel him to furnish copies of the evidence taken at the trial of defendant.

Defendant Campbell appeared in person.

Auguste Noel, for Valiquette.

CRAIG, J.:—Graham Campbell and John J. Miller were indicted and tried for aggravated assault before Mr. Justice Dugas on 16th April, 1904, without a jury, and were convicted and sentenced to a term of imprisonment. That term of imprisonment they served, and now Graham Campbell, after making certain applications to the Department of Justice at Ottawa, has moved for a writ of mandamus to compel

J. Almon Valiquette, a court reporter acting as such at the trial of the indictment against him, above mentioned, to make and deliver to him full copies of the evidence taken upon that trial. The argument of Campbell is that he needs the evidence taken at the trial to present the same to the Department of Justice for certain purposes. I do not know, nor does he state very clearly, what the nature of the application is which he intends to make. That is not material in this application. He claims to be entitled to the evidence taken at the trial by Mr. Valiquette, the reporter. His material shews that he made application through the ordinary channels, being by demand upon the clerk of the Court, who was the custodian of those records, paying necessary fees, and that the evidence has not been furnished to him. In the copy of the evidence produced to him, he says, there are omissions material to the presentation of his case; that the copy produced and delivered to him does not contain all the evidence taken at the trial; that it does not contain rulings of the trial Judge which are material and which will affect his application. The charge laid against him for assault was for an assault committed upon one Slavin, who was the guardian of a timber limit. Slavin stopped Campbell and Miller on the road when they were drawing a load of wood away from this timber limit, claiming to be entitled to the wood; an altercation ensued and an assault took place, Campbell and Miller justifying the assault because they claimed to be the owners of the wood, and that the assault was no more than sufficient to repel the aggression of Slavin in attempting to take the wood from them on the highway. Campbell alleges that evidence disclosing the ownership of the wood, the nature of the assault, and the fact that it occurred upon the highway, is omitted from the evidence delivered to him by the reporter. He alleges that rulings were made by the trial Judge to this effect, that "if it be proved that the wood was the property of the defendants Miller and Campbell, the assault was justified;" further that "if it be proved that the assault was committed on the highway it would be further justification for repelling Slavin's attack on them to deprive them of the wood:" that a witness was called from the Crown Lands Department to prove the ownership of the wood in the defendants and the payment of the Crown dues thereon, and that the Crown counsel admitted the documents to prove the title and admitted all the evidence which the witness then called could

have given to establish ownership; that all evidence of these admissions is omitted from and not contained in the copy of the evidence given to him by the reporter. Quite a number of affidavits are filed to prove that such evidence was given, and a great deal more evidence than I have recited, and not contained in the copy of evidence furnished by the reporter. Whether or not this evidence was given and whether or not the rulings and comments of the trial Judge upon the evidence were made I do not think is material to the determination of this issue by me. It is no doubt true that the court reporter ought to record everything material that drops from the lips of witnesses; that he is not the judge of the materiality of the evidence and is to a very large extent a pure automaton in recording the actual expressions and words of the witnesses so far as his skill will permit him; that rulings of the Judge upon points raised by counsel during the progress of the trial are material to be noted by the reporter, especially rulings upon the admissions of evidence or non-admission of evidence, and particularly when counsel on either side admit certain facts, and upon such admission counsel upon either side refrain from proving those facts by putting a witness in the box. These things are certainly material to be noted by the reporter. A ruling by the trial Judge as to evidence and its admissibility would certainly affect the conduct of the case by the counsel conducting it. Upon one material point, namely, the admission by the Crown counsel of the evidence which one Mr. Spence would have given as to the title to the wood, there is no evidence whatever in the reporter's notes, and there is no doubt the evidence was given; it is noted by the clerk. The reporter says he was not present in Court at the time of that occurrence, and says that the judgment of the learned trial Judge was prepared before that evidence was called. So far as I can gather from the material, the statement is that the Judge expressed the view that if the title to the wood was proven he would either dismiss the prosecution or impose a nominal penalty. Whether or not the Judge so ruled I cannot tell. If he did, it is not so noted. It is sworn both by Campbell and other witnesses that the Judge did so rule; that they were present in Court and heard the ruling. And it would seem that the calling of Spence to prove title occurred a day or two after the regular trial was closed, and probably upon the morning when the

judgment was delivered. Mr. Valiquette, the reporter, says he was not present on that morning. This he did not raise by affidavit, but upon this point being raised on the motion before me he verbally stated that he was not present in Court. Mr. Campbell has filed an affidavit of himself and another witness that Mr. Valiquette was present. These affidavits have been served and not answered. However that may be, Mr. Valiquette replies that he has no such notes of evidence, neither upon the point last mentioned nor upon any of the other points raised by the applicant; that the notes were taken conscientiously and transcribed conscientiously, and no part of the evidence withheld by him.

Mr. Campbell on this application appeared in person and was at a very great disadvantage in the presentation of his case and in the preparation of his material; but, in view of the answer given by the court reporter, I can do nothing but dismiss the application. The reporter is a public official and there is no doubt as to his duties. He must record conscientiously the evidence taken, and he is bound when the proper steps are taken by applicants to give to persons entitled true copies of that evidence. Mr. Valiquette says he has done so. There is no evidence to shew that he has not done so, that is, that he has not given a full and complete copy of all the notes taken by him during the time of the trial. That is all I can compel him to do. Whether he did or did not fully report I cannot now determine, and I do not need to determine. The witnesses may be mistaken, or they may not be mistaken. His competency as a stenographer is not for me to deal with. Mandamus can only issue against him for non-performance of his official duty. All the material which I have before me shews that no order which I can make against him can now compel him to produce any more material than he has produced. He has nothing more to produce, and therefore an order would be useless. A great deal of material was filed in this case of a scandalous nature which I have entirely thrown out and stricken from the files. It should never have been presented to me, and I think if Mr. Campbell had been advised by counsel, he would never have presented the material in the form in which he has.

The motion for the mandamus will be dismissed with costs.

NORTH-WEST TERRITORIES.

(CALGARY.)

JULY 18TH, 1905.

FULL COURT.

REX v. McLENNAN.

Criminal Law—Theft—Conductor of Train Taking Money from Passengers and Allowing Free Transportation—Jurisdiction of Justices — Conviction — Suspended Sentence—Costs.

Crown case reserved, argued before SIFTON, C.J., WETMORE, SCOTT, HARVEY, NEWLANDS, and PRENDERGAST, JJ.

P. J. Nolan, Calgary, for defendant.

R. B. Bennett, Calgary, for prosecutor.

WETMORE, J.:—Defendant was convicted before two justices of the peace for that he on 20th December, 1904, while travelling on train No. 23 between Macleod in the District of Alberta and the eastern boundary of British Columbia, in the North-West Territories, did unlawfully steal certain money to the amount of $3.75 of and belonging to the Canadian Pacific Railway Company, he being then and there a railway conductor employed in that capacity by the Canadian Pacific Railway Company, and while in and about the performance of his duties as such conductor in charge of the train aforesaid, and he was adjudged for his offence to enter into a recognizance of $100 without sureties for a period of one year to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behaviour, and also to pay W. A. N. Foy, the informant, the sum of $38.50 for his costs.

The defendant appealed practically by way of certiorari to my brother Harvey from this conviction, and the learned Judge submitted a case to this Court for its advice and assistance.

The facts were that defendant was a conductor in charge of a passenger train on the railway in question, and such train was boarded at Macleod by two men, one of whom said

he was going to the "Loop" and paid to the defendant the sum of $1.50. This person introduced the other person as his friend and as "all right," and the latter thereupon paid the defendant $2.25, saying he was going to Fernie, B.C. The first class fare from Macleod to the Loop was $3 and to Fernie $4.20, and there was no other rate.

No ticket or receipt was given by the defendant to either of the persons mentioned. It was the duty of the conductor to issue tickets in duplicate to passengers who paid their fare in cash, and to make a report to the company of the tickets sold and of the cash fares collected at the conclusion of each trip. The defendant did make the usual report at the conclusion of the trip in question, but did not report or account for any tickets issued or fares collected from Macleod to the Loop or from Macleod to Fernie. The objections raised to this conviction and argued before this Court were:—

First, that the justices have no jurisdiction to suspend a sentence or order the defendant to enter into a recognizance to appear and receive sentence when called upon and in the meantime to keep the peace.

Second, that they had no jurisdiction to impose costs.

Third, that no theft was committed within the provisions of the Code or otherwise, that the moneys paid by these travellers to him were paid to him and received by him as a bribe.

As to the first question raised. The justices were sitting under the provisions of paragraph iv. of sec. 782 (part LV.) of the Criminal Code of 1892, relating to the "summary trial of indictable offences," and they dealt with the alleged offence under paragraph (a) of sec. 783. The punishment provided where a person is guilty of theft triable by a magistrate, as defined by sec. 782 of the Code, is provided in sec. 787 of the Code, and that punishment is imprisonment in a common gaol or other place of confinement with or without hard labour for a term not exceeding 6 months. Section 971 of the Code provides that in a case in which a person is convicted before any court of any offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the court before which he is so convicted, that, regard being had to the youth, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the

Court may, instead of sentencing at once to any punishment, direct that he may be released on his entering into a recognizance, with or without sureties, and during such period as the Court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour. It was under that provision that the justices suspended the sentence in this case and required the party to enter into a recognizance.

Paragraph 3 of that same section provides that the court may, if it thinks fit, direct that the defendant shall pay the costs of the prosecution or some portion of the same within such period and by such instalments as the court directs. It was under that provision that the justices ordered the costs to be paid. And I may add here that a further objection was taken because the conviction did not order that the costs should be paid by instalments or specify the time when such costs were to be paid. Section 974, which is an interpretation clause, provides in effect that the term "court" as used in sec. 971 means and includes "Any superior court of criminal jurisdiction, any Judge or court within the meaning of part LV., and any magistrate within the meaning of part LVI."

It is evident that some mistake has been made in framing this section, because I cannot find that the term "magistrate" is used in part LVI. at all. It is, however, the term used in part LV. The objection to the conviction, therefore, is that sec. 971 does not warrant a magistrate under part LV. suspending a sentence or imposing costs, or, in other words, that a magistrate under part LV. cannot exercise the powers conferred by sec. 971. Now, I am of opinion that a magistrate, as defined by sec. 782, sitting for the summary trial of indictable offences, is a court. On referring to sec. 974 it is provided that every court held by a magistrate for the purpose of this part shall be an open public court. Consequently I am of opinion that the powers prescribed by sec. 971 are conferred upon such court. The maximum punishment provided for a conviction of theft by such magistrate is 6 months, and therefore they have the right to suspend sentence and require the party to give security to appear and meanwhile to keep the peace, and they have authority to impose costs.

With regard to the objection raised that the conviction did not provide when the costs were to be paid, I am of opinion that the fair intention to be gathered from the conviction was that the costs were to be paid forthwith, and that

was sufficient. The justices were not bound to direct that these costs should be payable by instalments.

The substantial question raised, however, is, whether the facts proved constitute the offence of theft. In order to constitute this a theft it must be brought within sec. 308 of the Code, which provides that "Every one commits theft who, having received any money or valuable security or other thing whatsoever, on terms requiring him to account for or pay the same, or the proceeds thereof, or any part of such proceeds, to any other person, fraudulently converts the same to his own use, or fraudulently omits to account for or pay the same or any part thereof, or to account for or pay such proceeds or any part thereof, which he was required to account for or pay as aforesaid." . . .

[Regina v. Cullum, L. R. 2 C. C. R. 28, distinguished.]

The question here is not whether the money was taken or received by defendant into his possession for or in the name or on account of his employer. The purpose for which he received it or took it into his possession is not a question which arises under the section of the Code. The question that arises there is, did he receive it on terms requiring him to account for it? Now I am of opinion that he did receive it on terms requiring him to account for it. He was the conductor of the railway company's train. His duties were to collect fares, or, in other words, to receive moneys from persons desiring to travel by the company's train for transporting them from one place to another, and in my opinion the defendant received the money from the two persons in question for that purpose. You may call it a bribe if you choose. To my mind it makes no difference. These men paid the money for the purpose of being transported by this train to their destination, and would not have paid it had that not been the purpose, and defendant must have known that fact. He, therefore, received the money within the scope of his employment. It makes no difference, to my mind, that he was forbidden to take less than the amount prescribed by the company's regulations or tariff. He received it as the price paid for the transport, and whether he received more or less than the tariff described, he was under the legal obligation to account to the company for it. The learned Judge should in my opinion be advised that this conviction is valid.

SIFTON, C.J., SCOTT, NEWLANDS, and PRENDERGAST, JJ., concurred.

HARVEY, J., stated that he was unable to agree with the majority of the Court. In his opinion the facts as stated did not constitute the offence of theft. If the charge could be supported it must be under sec. 308 of the Criminal Code. He referred to Regina v. Cullum, L. R. 2 C. C. R. 28, as covering the principle involved.

NORTH-WEST TERRITORIES.

(CALGARY.)

JULY 18TH, 1905.

FULL COURT.

MEUNIER v. DORAY.

Execution—Homestead Exemption — Conveyance of Homestead by Husband to Wife—Action to Set aside—13 Eliz. ch. 5—Consideration.

Appeal by plaintiff from order of HARVEY, J., dismissing action to have a transfer of land to defendant by her husband declared void, and for other relief.

J. R. Boyle, Edmonton, for appellant.

A. F. Ewing, Edmonton, for defendant.

WETMORE, J.:—The defendant is the wife of one Marcel Doray. About 29th August, 1899, a certificate of title was issued to him for the south-east quarter of 10-55-23 west of 4th. By instrument dated 19th August, 1899, duly registered, Marcel Doray transferred his property to his wife, Marie Doray, the defendant. The plaintiff on 2nd June, 1893, obtained a judgment against Marcel Doray and one Martineau for $223.75 and costs. A writ of execution against lands and goods was issued and placed in the hands of the deputy sheriff. This execution was issued on the judgment referred to. The return nulla bona was made by the deputy sheriff to this writ, and the writ at the time of the commencement of this action was a valid writ as against Marcel Doray's lands. The action was brought to have the transfer by Doray to his wife declared void under 13th Elizabeth, and that it be declared that Marcel Doray is entitled to an interest in such

land, and that the defendant be declared to be merely a trustee, and that it also be declared that the land is subject to the execution of plaintiff, and for an order to sell the same and realize the amount of such execution.

The case came on for hearing before my brother Harvey, who dismissed the action with costs, and plaintiff now appeals to this Court from that judgment. Section 2, clause 9, of the Exemption Ordinance (C. O. ch. 27) provides: "The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, viz . . 9. The homestead, provided the same be not more than 160 acres; in case it be more, the surplus may be sold subject to any lien or incumbrance thereon."

The property in question did not consist of more than 160 acres, and it is conceded that at the time of the transfer in question it was the homestead of Marcel Doray. No execution was issued until long after the transfer was made, as I have in effect hereinbefore stated. At the time of the transfer, therefore, there was no charge against this land. It is urged, however, that as Marcel Doray was in embarrassed circumstances (and I will assume for the purposes of this case such to be the fact), the conveyance was fraudulent as against the creditors under the statute of Eliabeth. Now, it is quite clear under the provisions of the Ordinance, that the property was not at the time of the transfer liable to seizure under any execution. That being so, I am quite unable to understand how it can be made available for the payment of creditors by the transfer. If it was not available for the payment of creditors at the time of the transfer, it could not be made available at the instant it passed into some other person's hands, because up to the very minute of the execution of that deed it was unavailable for that purpose. The effect of the statute of Elizabeth is to make a transfer void as against creditors, but if creditors had no interest in it while the title was in the name of the debtor, I cannot see how they can be held to have an interest after he ceased to have any interest in it.

In Sims v. Thomas, 9 L. J. Q. B. 399, Denman, C.J., is reported as follows at p. 404: "We are of opinion that the statute of Elizabeth only extends to the assignment of such effects as are liable to be taken in execution." The same principle would apply to real property. The plaintiff.

however, relies strongly in support of his contention upon two Manitoba cases, Frost v. Driver, 10 Man. L. R. 319, and Roberts v. Hartley, 14 Man. L. R. 284. The state of the law in the North-West Territories is very materially different from what it is in Manitoba. In Manitoba a registered judgment is by statutory enactment made a lien against the land, and it has been held there that it is a lien against all of the land, including property exempted from seizure under execution. I can quite understand, under such circumstances, the lien being there, that when the property ceases to be a homestead the lien will attach and can be enforced. We have no such provision in the Territories.

I will just in passing call attention, by way of supporting what I now hold, that in order that the statute of Elizabeth should apply, the property must at the time of the transfer be subject to execution, to what was stated by Bain, J., in his judgment in Roberts v. Hartley, at p. 291: "In saying, as many of the cases do, that the statute applies only to such property as can be taken in execution, this expression must be taken to be equivalent to property that can be compulsorily applied to the payment of the debts of the grantor, whether by execution or otherwise: Warden v. Jones, 2 De G. & J. 76."

Once having the lien established, the very moment the land ceases to be a homestead, I can understand how that lien could be enforced by compulsory sale. For these reasons, I am of opinion that plaintiff had no right to go against this land. I may say that in dealing with this matter I am assuming that the transfer was voluntary and without consideration. The learned Judge has, however, found that it was not a voluntary conveyance, but was made for valuable consideration. I do not wish to be understood as impeaching that finding. I merely express no opinion with respect to it.

It was urged that no person but the execution debtor could claim the exemption provided for by the Ordinance. I am not prepared to accede to that proposition. There is a very material difference between the Manitoba Act and the Territorial Ordinance; the Territorial Ordinance provides that "real and personal property of an execution debtor *and his family* is declared free from seizure." The Manitoba Act makes no such provision as to the property of the debtor's family being free from seizure, and I am disposed to think that the property in question being in a member of the

family, and being practically used by her for the benefit of the family, she would be, under the provisions of the Ordinance, in a position to claim the exemption. I make no authoritative decision upon that question, however, as I do not consider it necessary to do so, in view of the opinion I have expressed on the other question.

The plaintiff also asked for similar relief in respect to the north-east quarter of section 3-55-23 W. 4th. That property was purchased from the Canadian Pacific Railway Company, and the learned Judge held that it was practically purchased by the wife, and that the payments which had been made upon it had been made by the earnings of Marie Doray from this homestead, and that the earnings were hers and the result of her labour. It was practically conceded that if it is found that the transfer of the homestead to her was valid as against the creditors, the Canadian Pacific Railway lot was not available to the creditors either. The evidence, I think, establishes clearly that this must be conceded.

The result is, that, in my judgment, this appeal fails, and the judgment of my brother Harvey should be affirmed and this appeal dismissed with costs.

SIFTON, C.J., NEWLANDS and PRENDERGAST, JJ., concurred.

SCOTT, J., agreed that the appeal should be dismissed with costs, but on grounds different from those stated by WETMORE. J.

CORRECTIONS.

On p. 80 ante, third line from bottom, for "justified" read "qualified."

On p. 81, 14th line from top, after "trial" make a full stop, and insert "Defendant to have costs of trial."

On p. 82, 20th line from top, for "quantity" read "quality."

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MANITOBA.

MATHERS, J. OCTOBER 13TH, 1905.

CHAMBERS.

BAIN v. CANADIAN PACIFIC R. W. CO.

Discovery—Production of Documents—Privilege—Reports of Officers of Company—Contradicting Affidavit on Production — Examination of Officer of Company — Affidavit Made by a Different Officer.

Plaintiffs, farmers near Rosser, brought this action to recover damages for the loss of a quantity of hay, which they alleged was burned in a prairie fire started by sparks from one of defendants' locomotives. Defendants denied that the fire was started in the way alleged, and asserted that it was an ordinary prairie fire which did the damage, for which they were not responsible.

The plaintiffs, under an order obtained by them, examined one Price, the defendants' superintendent of transportation, for discovery. Price refused to answer certain questions put to him and to produce some documents, on the ground that they were privileged communications. Plaintiffs moved to compel him to answer the questions and produce the documents asked for.

A. E. Hoskin, for plaintiffs.

W. McLaws (Aikins & Co.), for defendants, contended that the affidavit on production was conclusive on the point as to the documents being privileged communications between defendants and their officers.

MATHERS, J.:—The examination discloses that it would be the duty of the conductor, engine driver, roadmaster, division superintendent, and master mechanic, to report the circumstances relating to the fire and the condition of the engine. The deponent was unable to say whether or not the officers named or any of them did make reports, and he refused, on advice of counsel, to make any inquiry.

Reports made in the regular course of duty are clearly not privileged: Armstrong v. Toronto Street R. W. Co., 15 P. R. 288; Betts v. Grand Trunk R. W. Co., 12 P. R. 86; Worley v. North British R. W. Co., L. R. 4 C. P. 602; Cook v. Metropolitan R. W. Co., 6 T. L. R. 22; Savage v. Canadian Pacific R. W. Co., 1 W. L. R. 441; and he must obtain the information necessary to enable him to answer fully and definitely.

It is contended, however, that the defendants' affidavit of documents is conclusive unless the existence of other documents is revealed by admissions in the pleadings, or by other documents produced, or by the examination of the party by whom the affidavit was made, and that it cannot be impeached by the examination of another officer of the company.

I am not aware that this precise point has ever been decided. The affidavit is made on behalf of the defendant company, and any examinable officer of the company can be examined upon it. It follows, I think, that such an examination can be used for the purpose of contradicting the affidavit.

The affidavit states that the reports for which privilege is claimed were "written and procured and received by or for the defendants' solicitor and under his express instructions." If that statement is true and the evidence of the officer examined is also true, then there are probably two sets of reports, one set obtained under the instruction of the solicitor and the other made by the officers named, in the regular course of their duty. If, however, both deponents refer to the same reports, I should accept as the more likely to be correct the statements made on the examination. Affidavits as to documents are often made in a most perfunctory manner, the affiant having but a very indifferent knowledge of what the affidavit contains; and the schedules attached are frequently more remarkable for what they do not than for what they do contain.

The correspondence moved for is in a somewhat different position. The deponent was not asked and did not say whether or not this correspondence was conducted in the regular course of official duty. He, however, refused, on the advice of counsel, to make any inquiry as to its existence. He must inform himself on this point so as to enable him to answer fully and explicitly, and if any such correspondence exists he must produce such as is not privileged.

The plaintiff is also entitled to the reports made on the engine for a reasonable time before and after the fire. The fire occurred on the 20th. Reports for the 19th, 20th, 21st, and 22nd were produced. The plaintiff asks for production of the reports for the whole month of November. I think the request reasonable.

There will be an order that the examinant attend at his own expense and answer fully and explicitly as to the existence or non-existence of the reports Nos. 1, 2, 3, 4, 5, 7, and 8 in the examiner's certificate filed herein, and if all or any of them are found to exist, produce the same. He shall also answer fully and explicitly as to the correspondence referred to as No. 6, and the circumstances under which it was conducted, and produce such as is not privileged; he shall also produce the reports on engine 549 for the whole month of November, 1904.

Costs of this application shall be costs in the cause to the plaintiff in any event.

BRITISH COLUMBIA.

(VANCOUVER.)

MORRISON, J. OCTOBER 12TH, 1905.

CHAMBERS.

RE CHIN CHEE.

Immigration Act—Exclusion of Immigrants Afflicted with Disease—"Passengers"—Application to Citizens of Canada Returning from Abroad.

Motion by Chin Chee, a Chinaman detained by the Canadian Pacific Railway Company on an order from the Do-

minion Government, to make absolute a summons for a writ of habeas corpus to the Canadian Pacific Railway Company to try the right to detain the applicant.

Chin Chee was a former resident of Vancouver, a Canadian citizen, and had obtained leave to go to China provided he returned within one year. He had been brought back from China to British Columbia by one of the Canadian Pacific Railway Company's ships, within the specified time, but had been detained by order of the medical officer of the Immigration Department of the Dominion Government as being afflicted with trachoma. The disease had been pronounced incurable by the official, and he had ordered his deportation by the company.

T. R. E. McInnes, for the applicant.

C. B. Macneill, K.C., for the Dominion Government, contended that by 2 Edw. VII. ch. 14, sec. 1 (D.), the Dominion Government had power to deport not only immigrants but all passengers landing at Canadian ports where they were afflicted with an incurable disease.

The section in question amends sec. 24 of the Immigration Act, R. S. C. ch. 65, in the following manner:—

"24a. The Governor-General may, by proclamation or order, whichever he considers most expedient, and whenever he deems it necessary, prohibit the landing in Canada of any immigrant or other passenger who is suffering from any loathsome, dangerous, or infectious disease or malady, whether such immigrant intends to settle in Canada, or only intends to pass through Canada to settle in some other country.

"2. Such prohibition may be absolute, or may be accompanied by permission to land for medical treatment only, for a period to be determined as provided by order or proclamation."

The definition of the word "passengers" as contained in the original Act is as follows: "The expression 'passengers' applies to all passengers as well as the immigrants usually and commonly known and understood as such, but not to troops or military pensioners or their families who are carried in transports or at the expense of the Government of the United Kingdom."

MORRISON, J., held that the word "passengers," within the meaning of the statute, did not include citizens of Canada

who are returning after having taken a trip abroad; that to make the statute applicable to such case would work a great hardship, which was not contemplated or ever intended by Parliament in passing the Immigration Act; that the Act applied to immigrants and to persons of the class commonly called immigrants and to foreign passengers or citizens of any foreign country, who might land at Canadian ports, and that to stretch the meaning of the statute far enough to include home-coming citizens of Canada was unreasonable and absurd.

Order made for discharge of applicant. No costs.

BRITISH COLUMBIA.

(VANCOUVER.)

MORRISON, J. OCTOBER 12TH, 1905.

CHAMBERS.

TORONTO AND BRITISH COLUMBIA LUMBER CO. v. MOORE.

Writ of Summons—Application to Set aside—Irregularity—Intituling of Affidavits.

Application by defendant upon the return of a summons to set aside a writ of summons served on defendant ex juris, for various alleged irregularities, the principal of which was an alleged failure to sufficiently indorse the address of the plaintiffs on the writ. The affidavits and documents used in support of the application were intituled "In the Matter of an intended Action."

C. B. Macneill, K.C., for defendant.

J. E. Bird, for plaintiffs, objected that the writ of summons having been issued on 18th July, 1905, and actually served on defendant, the affidavits, etc., on the present application were wrongly intituled "In the Matter of an intended Action," and that, following the decision of Irving, J., in Tanaka v. Russell, 9 B. C. R. 24, the summons should be discharged. On the principle of Scott v. Durrant, 3 Ch. Ch. at p. 399, a litigant moving to set aside a proceeding for irregularity must himself be regular.

MORRISON, J., discharged the summons with costs, following the decision of Irving, J., in Tanaka v. Russell, holding the objection fatal to the application.

NORTH-WEST TERRITORIES.

(CALGARY.)

JULY 18TH, 1905.

FULL COURT.

LAWTON v. REID.

Promissory Note—Consideration—Purchase of Seed Grain—Warranty, Implied or Express — Breach — Findings of Trial Judge.

Appeal by defendant from judgment of SIFTON, C.J., in favour of plaintiff in an action upon a promissory note.

R. B. Bennett, Calgary, for defendant.

C. A. Stuart, Calgary, for plaintiff.

The judgment of the Court (WETMORE, SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ.), was delivered by

HARVEY, J.:—This is an action on a promissory note. The making of the note is not in question, but the consideration for it is shewn to have been a quantity of oats which was purchased by defendant from plaintiff for the purpose of seed, and used by him as such.

It is alleged by defendant that plaintiff expressly warranted the oats to be good seed oats, but that, as a matter of fact, the oats had been frozen, in consequence of which he had a very poor crop. Defendant not merely sets these facts up as a defence to the action, but counterclaims in respect thereof for damages. The action was tried by the Chief Justice, who gave judgment for plaintiff for the amount of the note.

In the argument before this Court, in addition to the express warranty, the defence set up an implied warranty. The Chief Justice, on being consulted, states that no contention

that there was an implied warranty was made before him at the trial, and it is very doubtful whether, on the pleadings, this contention is open to defendant. It is, however, unnecessary for this point to be expressly decided.

The judgment of the trial Judge is simply a judgment in favour of plaintiff, and contains no express findings on the facts.

His judgment, therefore, might have been given on the ground that he found that the express warranty had not been proved, or that it had not been proved that any loss suffered by defendant was due to any inferiority in the quality of the grain which he purchased from plaintiff. In the absence of express finding, I am of opinion that it should be assumed, if the evidence warrants it, that he found against defendant on both these points. The matter has, moreover, been referred to him, and he informs us that his conclusion was against the defendant on both the grounds mentioned. This being the case, the Court on appeal should not interfere with the judgment if there is reasonable evidence to support these findings. As regards the question of the express warranty, it is explicitly denied by plaintiff that there was any warranty as alleged, and one witness states that defendant told him that plaintiff did not guarantee the oats. This question, therefore, would seem to require no further consideration.

There appears also to be quite sufficient evidence to support the finding of the trial Judge that whatever shortage of crop defendant had from the seed in question is not shewn to be due to any inferiority in the quality of such seed. While there are numerous witnesses produced by defendant who swear that, in their opinion, from the appearance of the grain as it was growing, the seed had been frozen, yet several witnesses gave evidence that would lead to a reasonable conclusion that the injury was due to some other cause. It is stated that while the grain was generally thin upon the ground, there were spots where there was no grain whatever. It is also stated that there was frost in the neighbourhood after the grain had started to grow, which may have caused injury, and that the appearance of the grain at that time indicated that it had been frozen. There is also evidence of hail in the neighbourhood and of dry weather, which injured other crops, and may have injured this. With all this evidence it cannot be said that the trial Judge could not reason-

ably find that, even if there had been a warranty, either express or implied, the breach of it had not been proven, and having so found, in my opinion the finding should not be disturbed.

For the reasons mentioned the appeal should be dismissed with costs.

NORTH-WEST TERRITORIES.

(CALGARY.)

JULY 18TH, 1905.

FULL COURT.

WAINWRIGHT v. VILLETARD.

Malicious Prosecution — Reasonable and Probable Cause — Question for Court — Evidence—Reasonable Belief in Truth of Charge—Malice—Motive—Honest Attempt to Ascertain True Facts.

Appeal by defendant from judgment of SIFTON, C.J., in favour of plaintiff for $250 damages and costs in an action for malicious prosecution.

F. C. Jamieson, Strathcona, for defendant.

N. D. Mills, Strathcona, for plaintiff.

The judgment of the Court (WETMORE, SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ.), was delivered by

PRENDERGAST, J.:—It appears that on 13th April, 1889, the defendant bought, through the firm of Carscaden & Wainwright, of which the plaintiff was a member, and who were acting as agents of the Deering Implement Company, a waggon, for which he gave a lien note for $37.50 and interest in favour of the said company, payable on 1st January, 1900.

In the month of March following, when this note was about 3 months overdue, defendant settled for it in full with plaintiff, giving him an order for $20 on his (plaintiff's) father, which was duly honoured, and $20 in cash.

After, as he says, asking for the return of his note on that occasion, to which plaintiff replied that it was in the bank and

he would get it in the morning, defendant swears that he renewed his demand to plaintiff shortly afterwards, and again about a year later (which would be about March, 1901), and that plaintiff then told him that he would see the company's chief agent about it. Plaintiff, on the other hand, while practically admitting that he was asked for the note when the same was settled for, denies that he was asked for it several times thereafter.

In the spring of 1901 the connection between the Deering Implement Company and the firm of Carscaden & Wainwright was severed, and the latter dissolved. This seems to have been brought about by serious differences, the company asserting that the moneys collected for them by Carscaden & Wainwright had not been duly accounted for, and threatening them with suit in consequence. The firm, however, eventually settled such differences by giving the Deering company $100 in cash, together with a note of plaintiff for $150 and two of Carscaden for $40 each. Following this settlement plaintiff obtained from the company a general release dated 24th June, 1901, purporting, in the usual form, to release him from all claims of the company, "particularly in respect of certain matters" therein set forth, one of them so set forth being defendant's lien note above referred to. Plaintiff then went over to the United States, where he remained 23 months, and it might be stated that in the meantime the note he had given to the Deering company in settlement became overdue and was not attended to. During plaintiff's absence defendant's waggon, which had been bought through Carscaden & Wainwright, was seized by the company. In October, 1901, or 4 months after plaintiff left, defendant had already been told by the company's manager at Edmonton that his note remained unpaid and advised him to see Wainwright about it (which of course he could not do), and 7 months later, that is to say, in May, 1902, the seizure was effected and the waggon taken away from his farm. After, however, coming to see the Deering company's agent in Edmonton and threatening them with legal proceedings on the strength of the receipt which he held from Wainwright, the defendant prevailed upon them to accept $26.35 in settlement, and upon payment of this amount the waggon was released.

Nothing after that happened for a year, when plaintiff returned from the United States. This was on 16th May,

1903, and two days later the parties met at Strathcona, at a livery stable owned by plaintiff's father. What exactly happened during that day is, in some respects, the subject of rather conflicting testimony. This, at all events, seems to be well established: that defendant, having heard of plaintiff's return, went to see him at Strathcona about his note and the seizure of the waggon, and was assured by him that he had turned the money in to the company; that defendant then went into the office in the livery barn, when he saw Wainwright sr., who told him that it was not his son but Carscaden who had the handling of the firm's money, and that he would not pay Carscaden's debts; that defendant next went over to Edmonton and interviewed Mr. Powell and Mr. Bouchier, the two principal officials of the company there: that they gave him again the assurance that the money had not been paid in, and that, at (defendant's) earnest solicitation, Mr. Greenwood, the company's bookkeeper, was made to go over the books minutely without being able to find trace of any such payment; that defendant then went to see his solicitor, and finally to a police magistrate, before whom, after some conversation, he laid an information, pursuant to which plaintiff was arrested, put in gaol, and the next day made to answer to a charge of theft, which, however, was withdrawn by defendant in the course of the preliminary investigation, upon hearing word from the Deering officials that they had just found in the books entry of a settlement made with Carscaden & Wainwright.

The defendant admits having once or twice in the day used the words "I want my money," but denies having threatened the plaintiff to lay an information against him. There is also rather conclusive evidence that defendant again spoke to plaintiff after his conversation with Wainwright sr. in the barn, and that he had then already been once at the Deering office in the same afternoon, irrespective of the occasion when the books were more fully gone into, which was later in the day. The defendant, moreover, swears that upon plaintiff saying, in answer to his own observations, that the money had been paid, and he would see the chief agent about it, he (defendant) replied: "You told me a year ago you were going to see Mr. Bouchier, and the result was my waggon was seized."

Plaintiff, on the other hand, says that defendant was very violent in language, and used the following words: "I said

I had turned it (the money) over and was perfectly willing to go with him to the Deering Implement Company to see about it, but he said he wanted his money, and he wanted it quick—that he would have me arrested—and I said he couldn't do it." The evidence of one McEacgran, the only other witness called by plaintiff, is simply to the effect that on the day the preliminary investigation was held defendant seemed very hostile to plaintiff and said that he had been watching for him and that he would put him where the dogs wouldn't bark at him.

Plaintiff's main grounds are: 1st, that defendant, especially for having refused or at all events not accepted plaintiff's offer to go with him to the Deering company's office, cannot be said to have had reasonable and probable cause to lay the charge; and 2nd, that the strong language and threats of arrest which he is alleged to have used, as well as the words "I want my money" and "it's my money I'm after," are evidence that he was actuated by improper motives, constituting malice.

I gather from the judgment of the learned Chief Justice, read together with his statements made in reply to two questions put by defendant's counsel as they appear in the appeal book, that he did not find that malice, as a separate element, was proven by any part of the evidence bearing distinctly thereon, but that he inferred the same, as there is no doubt may be done in some cases, from what he considered an absence of cause.

For that reason, and on account of the general nature as well as the special circumstances of the case, it is not necessary to enter at all into the question of malice, as the matter can be fully disposed of on the first ground alone.

It is fully settled that in an action for malicious prosecution, both the want of reasonable and probable cause and malice must be shewn; and the rule is as clear that, although such want of reasonable and probable cause constitutes a negative, yet the onus of proving the same rests on the plaintiff: Lister v. Perryman, L. R. 4 H. L. 521; Abrath v. North Eastern R. W Co., 11 App. Cas. 247.

The findings of a jury, or of a trial Judge sitting as a jury, should not, of course, be disturbed by the court of appeal except in extreme cases where there is absolutely no evidence to reasonably support such findings.

In an action like the present one, on the other hand, there are certain questions of fact which belong to the jury, while certain other questions which are in no way questions of law are left to the Judge to determine.

The jury find the facts on which the question of reasonable and probable cause depends, but the Judge determines whether those facts do constitute reasonable and probable cause: Hilliar v. Dade, 14 S. L. R. 534.

In one of the cases above cited (Lister v. Perryman, L. R. 4 H. L. 521), which is one of the same nature, Lord Chelmsford says (p. 535): "The verdict in cases of this description, therefore, is only nominally the verdict of a jury." And Lords Westbury and Colonsay (pp. 538 and 539): "The existence of reasonable and probable cause is an inference of fact —it is an inference to be drawn by the Judge and not by the jury." And: "It appears to be settled law in this country that want of reasonable and probable cause is matter for the Court."

The learned Chief Justice has found here that plaintiff did in fact, an hour or so before his arrest, offer to the defendant to go with him to the Deering company's office, and, although this is denied emphatically by defendant, and the onus rests on plaintiff, this finding should not be disturbed, as indeed the conclusions of the judgment in the absence of a specific finding on all the facts seem to require that the construction the most favourable possible to the plaintiff should be put on the evidence by this Court. But, even going to that length, it does seem, with all due deference, that the inference that defendant did not act with reasonable and probable cause —which is within this Court's province to review—was not warranted. It is very difficult, indeed, to completely dissociate defendant from the actual facts with reference to the money he paid to plaintiff, even if the evidence does not shew that they were all brought to his knowledge. We have it from plaintiff's own evidence that it was as late as 24th June, 1901, that he and his partner Carscaden settled with the company as for notes collected by them and not accounted for, amounting to $330, and that one of those notes was that of defendant, which he had paid as early as 30th March, 1900, that is to say, 15 months before. Whether the money had really been misappropriated during all or part of that time, or whether the differences in question were the result of lax business methods or other causes, does not appear in the

evidence and must be matter of conjecture. Even if it be untrue that defendant, as he says, asked plaintiff for the return of his note as often as three times before the date of the latter's settlement with the company, he (defendant) knew at all events that he had paid the money to plaintiff and asked him for the return of his note at least on one occasion not denied by plaintiff; he knew that he never received back the note to which he was entitled, that the company's general agent at Edmonton had claimed the amount over again in the fall of 1901, that the company would not acknowledge the receipt the plaintiff had given him, that his waggon was seized in the spring of 1902, and that he had to pay $26.35 to have it released. The conversation he had with the defendant's father, Wainwright sr., was also likely to confirm him in his belief, as the latter practically admitted that the money had been misappropriated, only laying the fault on Carscaden, whose debts, he said, he was not going to pay. And, even with all this information, defendant, before laying the charge, goes twice to the office of the company across the river, again asks for a careful examination of the books, which was made by the book-keeper in his presence, and in the presence of one Cams, who accompanied him, and of the two head officials of the company, and he is again assured that the money was not paid in.

If plaintiff did really offer to defendant to go with him to the Deering company's office—and we must assume that he did—was it not natural for defendant, under the circumstances, to suppose that this was only a ruse or a feint, or at all events that the step would be useless, and is it to be wondered at that he should have replied, as he asserts he did, that he (plaintiff) had already promised him to see the general agent, and the only result had been that his waggon had been seized?

Perhaps it does not matter, although it seems an extraordinary circumstance, that plaintiff never shewed defendant his release from the company or told him of the existence of such a document; but it does matter that plaintiff did not account for the money in question as he should have done, that defendant was aroused by the seizure of his waggon, and being made to pay $25.36 in excess, and that repeated inquiries and an earnest search of the company's books only confirmed his suspicions. He sought information from the most reliable source at hand. If we are to judge his conduct

from such information only as the evidence shews he actually had, it was quite justifiable; and should we suppose that he was cognizant of all the facts leading up to the settlement and lease of 24th June, 1903, it would even be more so. Even for the fact that the entry in question could not at first be found in the books, the plaintiff seems to be in a way responsible; for it was probably all due to the fact that the funds collected having been irregularly accounted for, an entry altogether out of the ordinary was made of the same, and could not be readily found when looked for under the headings of accounts kept in the regular course of business.

"The defendant will be deemed to have had reasonable and probable cause for the prosecution when he took reasonable care to inform himself of the true facts, and he honestly, although erroneously, believed in his information, and that information, if true, would have afforded a prima facie case for the prosecution complained of:" Abrath v. North Eastern R. W. Co., 11 App. Cas. 247.

"Absence of reasonable and probable cause could not be held to have been shewn simply because further inquiries might have been made or further facts shewn:" Malcolm v. Perth Mutual Fire Ins. Co., 29 O. R. 406.

"If a reasonable amount of credible information has been received, that appears to me to be all that is required:" Lister v. Perryman, L. R. 4 H. L. at p. 539. And in the same case, which is one where the defendant acted partly on information obtained from people speaking merely by hearsay, Lord Chelmsford (p. 540) said: "The question was not whether the defendants might have obtained more satisfactory or surer grounds of belief by applying to Robinson for direct information, but whether the facts brought to his knowledge furnished reasonable and probable cause for believing that the plaintiff had dishonestly possessed himself of his gun, and justified him in acting on that belief without further inquiry."

Here, from all the circumstances of the case, it seems that the facts brought to defendant's knowledge furnished reasonable and probable cause for believing that plaintiff had misappropriated the money in question, and justified him in acting on that belief without taking the further step of going with plaintiff to again inspect the books of the company.

In the opinion of this Court, the appeal should be allowed with costs, the judgment of the Chief Justice set aside, and judgment entered for defendant with costs.

NORTH-WEST TERRITORIES.

(CALGARY.)

JULY 18TH, 1905.

FULL COURT.

ANDREAS v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to Person Crossing Track—Negligence—Speed of Train—Failure to give Statutory Warning—Fences—Thickly Populated Part of Town—Contributory Negligence—Findings of Jury—New Trial.

Appeal by defendants from judgment of NEWLANDS, J., upon the findings of a jury, in favour of plaintiff, the widow and administratrix of the estate of Nicholas Andreas, deceased, in an action to recover from defendants damages by reason of the killing of her husband and a pair of horses and injury to a waggon, by the alleged negligence of the servants of defendants.

The appeal was heard by SIFTON, C.J., WETMORE, PRENDERGAST, and HARVEY, JJ.

J. A. M. Aikins, K.C., for defendants.

Ford Jones, Regina, for plaintiff.

WETMORE, J.:—On 22nd June, 1903, the deceased, Nicholas Andreas, passed west on what is known as South Railway street, in the town of Regina, came to Albert street, and then proceeded north on this last mentioned street towards defendants' railway. There was a railway crossing at Albert street. In attempting to cross the railway at this crossing the horses and waggon in which he was driving were struck by one of defendants' trains coming from the west, and he and the horses were killed and the waggon practically destroyed.

The acts of negligence alleged and attempted to be proved were: 1st. That there was a failure to blow the whistle or ring the bell of the engine, as required by sec. 256 of the Railway Act, 51 Vict. ch. 29, which was the Act in force at the

time. 2nd. That the locus in quo was a thickly peopled portion of the town and that the locomotive was passing there at a speed greater than 6 miles an hour. 3rd. That, in view of the character of the crossing, it being one over which a great many people and teams passed, and the fact that there was a tool shed which would to some extent obscure from view an approaching train, the crossing was dangerous, and that the train was running at a dangerous and reckless rate of speed.

In coming along South Railway street and passing along Albert street up to about opposite where this tool house was, an approaching train coming from the west could be seen without any obstruction at a distance at least of one mile and a half away. This tool house was 108′ 3″ x 128′ 3″, the height was 128′ from the ground to the peak, and the sides were 7′ 7″.

Among other things, it was contended on behalf of defendants that the uncontradicted evidence established conclusively that the death of Andreas was solely due to his own negligence; that if he had, as an ordinarily prudent man would have done, looked in the direction of the west, from which the train came, he would have seen it, and that it must be assumed that he either omitted to take this ordinary precaution, or if he did take it that he recklessly undertook to pass in front of the train, so that the death was brought about by his own carelessness or recklessness; and that the trial Judge should have nonsuited plaintiff at the conclusion of the case or have directed a verdict for defendants at the close of the whole case.

The following questions were submitted to the jury. which they answered as follows:

1. Q.—At what rate of speed was the engine running at the time it crossed Albert street? A.—25 miles an hour.

2. Q.—Was such rate of speed a dangerous rate of speed for such locality? A.—Yes.

3. Q.—Was the death of the deceased caused in consequence of any neglect or omission of the company; if so, what was the neglect or omission which caused the accident? A.—1st. Yes. 2nd. Failure to reduce speed of train as provided in Railway Act.

4. Q.—If you find plaintiff entitled to recover at what do you assess the damages? A.—(a) By reason of the killing of the deceased, $5,000; (b) For the destruction of the horses and waggon, $400.

The above questions were submitted on behalf of plaintiff, and the following questions were submitted on behalf of defendants, and answered as stated below:

1. Q.—Could Andreas, had he used ordinary care, have seen the train in time to have avoided the accident? A.—No; owing to the tool house obstructing the view of the track for a considerable distance.

2. Q.—Could an ordinary man by the exercise of reasonable care have avoided the accident? A.—Same as No. 1.

3. Q.—Did plaintiff's husband exercise reasonable care to avoid the accident? A.—Same as No. 1.

4. Q.—Might he have exercised greater care, and, if so, in what respect? A.—No.

5. Q.—Did the condition of the approaches to the crossing on Albert street in any way contribute to the accident, and, if so, how? A.—No.

6. Q.—Could Andreas when he first observed train No. 2 have jumped and avoided death? A.—No.

No doubt the jury intended by their answer to question No. 2 of the questions submitted on behalf of defendants to state that an ordinary man by the exercise of reasonable care could not have avoided the accident owing to the tool house obstructing the view of the track for a considerable distance. And by their answer to question No. 3 submitted on behalf of defendants, no doubt they intended to state that in view of this tool house so obstructing the view of the track the deceased did exercise reasonable care to avoid the accident. The defendants on these findings of the jury applied to the trial Judge to enter judgment for them.

Inasmuch as the jury have found that the death of the deceased was caused in consequence of the neglect or omission to reduce the speed of the train as provided in the Railway Act, and have not found that it was caused in consequence of any other neglect or omission, it is not necessary, in view of what was held in Grand Trunk R. W. Co. v. McKay, 34 S. C. R. 81, to consider the other matters of negligence alleged. The jury have found, in effect, that the negligence or omission which caused the accident was the failure to reduce the speed as provided by sec. 259 of the Railway Act, as amended by 55 & 56 Vict. ch. 27, sec. 8, because that was the only section of the Act relied on as controlling the speed. This finding, it is contended on behalf of the defendants, is contrary to the

evidence, because it is alleged that the place where the accident occurred and over which the locomotive was passing at the time was not a thickly peopled portion of the town, and that, if it was not a thickly peopled portion of the town, the company had the right to run their trains at whatever rate of speed they chose unless they were restricted by some statutory provision or by some regulation of the Railway Committee of the Privy Council made under the powers conferred upon it by the Act. The track was not fenced at this place in any sense of the word. I am free to confess that if the same privilege is conferred upon me that seems to have been conferred upon the jury by the trial Judge, namely, the privilege of exercising my own knowledge of the locality, I would have no hesitation in stating that, in my opinion, the place of the accident was not a thickly peopled portion of the town. If it is a thickly peopled portion of the town, I should be somewhat curious to know what would constitute a portion of the town that was not thickly peopled. However, I concede that the question is one of opinion and one of fact, and another person might take a different view of it from what I would. Being a question of fact, I am not prepared to say that there was not evidence to warrant the jury in coming to the conclusion to which they did come, because they could not have reached the conclusion which they did reach unless they found that this place was a thickly peopled portion of the town. Having come to this conclusion, I am of opinion that there was evidence to submit to the jury as to whether or not there was contributory negligence on the part of the deceased, and from which the jury might find, as they did in effect, that the deceased was not guilty of contributory negligence. I can quite understand that it would not occur to a person passing along South Railway street to look west to see whether a train was coming from that direction, because it was quite a distance from where South Railway street joined Albert street to where the crossing was, and I can quite understand that it would not occur to a person of ordinarily careful habits to look for a train coming from the west until he got fairly close to the railway track. Now, there was evidence in this case from which the jury could find that while this man was passing along Albert street a train which was to the east of the crossing and very near to it indeed was shunting and moving backward and forward, and that the whistle of that locomotive was blown and its bell rung, and that there was a considerable amount of shouting. There

was no evidence that the deceased was well acquainted with this crossing, and I can quite conceive that his attention might be so taken up with the train and noise of the people to the east that he would not be looking towards the west at all, and it would only occur to him to look to the west when he got behind the tool shed, and when he got there his view would be obscured. This tool shed was only about 19 feet south of the railway track, and was to the west of Albert street and close to that street. I am not prepared to say that a jury would not be justified, under all these circumstances, in coming to the conclusion that there was no contributory negligence on the part of the deceased. I think the case in this respect comes within what was held by the House of Lords in Dublin, Wicklow, and Wexford R. W. Co. v. Slattery, 3 App. Cas. 1155. . . .

I think the remarks of the Lord Chancellor at p. 1166 are applicable to this case, assuming that the failure to reduce the speed of the locomotive was a negligent act on the part of the defendants. I think that the circumstances of this case, which I have hereinbefore set forth, were properly submitted to the jury in order that they might say whether the failure to reduce the speed or the want of reasonable care on the part of the deceased was the causa causans of the accident. Danger v. London Street Railway Co., 30 O. R. 493, was cited on behalf of the defendants upon this point, but the facts of that case were very different. The plaintiff in that case had not his attention drawn away by any circumstances of the character which I have stated might be sufficient to take away the attention of the deceased in this case, and, while he was in a covered buggy, he could lean and reach his head forward so as to see around without much difficulty, and he didn't look or endeavour to look, nor did he listen for any noise, to ascertain the position of that car before crossing the track in front of it, although he knew the car which caused the accident was coming on the track. O'Hearn v. Town of Port Arthur, 4 O. L. R. 209, was also relied on by the defendants. In that case the plaintiff, about 100 feet from the point at which he tried to cross, looked back, and no car was to be seen; he did not look again before trying to cross, and a car came into collision with him and did the damage. There was nothing whatever to distract his attention in any way, the outlook was clear, and there was no obstruction to it: and, in my opinion, as before stated, the facts of

the case are more within the case in 3 App. Cas. than within the two Ontario cases referred to.

It is contended, however, that in so far as the general public are concerned there is no obligation on the defendants to reduce their rate of speed, even assuming that it was a thickly populated part of the town and not fenced: and Grand Trunk R. W. Co. v. McKay, before referred to, was relied upon in support of that proposition. The facts of this case are not the same as those in the case just referred to, because the Court held there that the track was, as a matter of fact, fenced as provided by sec. 259 of the Act as amended, according to their interpretation of that section; and, it being so fenced, there was no limit to the rate of speed by any provisions of the Act, and there could be no such limitation unless by regulation of the Railway Committee—and there was none. But in that case Davies, J., in delivering the judgment of the Court, referred to secs. 197 and 259 of the Railway Act, as amended by the Act of 1892, 55 & 56 Vict., before referred to, and laid it down at p. 100 that "their object was not to provide for the protection of the public travelling along the highway, which was provided for by the 187th section of the Act, but for the safe passage of trains, and to secure that safe passage as far as possible by the exclusion of animals from the track either by way of the highway or from the adjoining lands." I am of opinion that this Court is bound by what was laid down. It has been suggested that this is a mere dictum, that it was not necessary to lay this down for the decision of the case, and that this Court is not bound by it. I am unable to take that view. The question certainly was one that arose in the case. It was not only in the judgment of Davies, J., but it was concurred in by the Chief Justice and Mr. Justice Killam, and these Judges constituted the majority of the Court. It was the judgment of the Court, and if it is erroneous it is not for this Court to say so: it must be left to the higher tribunal to correct it if it is open to correction. I do not wish to be understood as intimating that it is erroneous; all I desire to intimate is that it being the judgment of the Supreme Court it is not necessary for me to investigate the question. I must accept it. That being so, I cannot see how the deceased or the plaintiff in this case can claim protection against an omission which was not enacted for their benefit. The Railway Committee, in view of the dangerous crossing at this point, not

having been invoked under sec. 187 of the Act to make the necessary regulations to minimize or do away with the danger, the company cannot be held to have committed an act of negligence in so far as the deceased or the plaintiff are concerned. This, in my opinion, comes within the ratio decidendi of Grand Trunk Railway Co. v. McKay; and as to the plaintiff having the right to recover within the principle of what was laid down in Gorris v. Scott, L. R. 9 Ex. 125.

I am of opinion therefore that the trial Judge should, upon the answers to the questions handed in by the jury, have directed the judgment to be entered for defendants, and this appeal should be allowed, and the judgment below reversed, and judgment entered for defendants accordingly, with costs; and plaintiff should pay the costs of this appeal.

HARVEY, J.:—I entirely agree with the opinion of my brother Wetmore, except as to his conclusion that the jury having found that the accident was occasioned by the negligence of the defendants' servants in running at too high a rate of speed, it must be assumed that in their opinion that is the only negligence contributing directly to the accident.

It is quite true that there are statements in the judgments of both Mr. Justice Sedgewick and Mr. Justice Davies in Grand Trunk R. W. Co. v. McKay, which, taken in their widest significance, would seem to warrant this conclusion, but it appears to me that they must be taken in connection with the findings of the jury which were being dealt with, and which differentiate the case very materially from the one under review. In the case before us there was much evidence of a very conflicting character, as to the blowing of the whistle and the ringing of the bell, and on that evidence I am distinctly of opinion that a finding by the jury that defendants had been negligent in not ringing the bell or blowing the whistle as required by statute, and that the accident was caused thereby, could not be set aside. The jury, however, were not asked any direct question on this, as they were in the McKay case, and consequently there is no express finding on that. In the McKay case the jury were asked the question, and the finding was that the whistle had been blown and the bell rung, though not strictly as required by the statute, but their attention having been drawn to this by the questions asked, and they having answered the questions as they did, and in such a way that the Court might very reasonably say

that the neglect to comply with the law strictly could not reasonably be considered to have caused the accident, and having ascribed negligence in another respect as the cause of the accident, the Court might reasonably conclude that the neglect in that minor respect was immaterial. In the case before us, however, it is quite otherwise. There is much evidence of negligence not only as regards the whistling and the ringing of the bell, but also as regards the speed of the train, and the Judge in his charge directed the jury's attention to both these matters, making no distinction between them as to the legal consequences, but their attention was directed to the rate of speed by the questions, while there were questions asked on the other side.

There was evidence to shew that, if the train had been running at the rate of speed authorized by law, it could have been stopped after the engine driver saw the deceased, without causing the accident. This being the case, it appears to me to be most reasonable to assume that the jury, having come to the conclusion they did, may have left the other question of negligence entirely unconsidered. It is an every-day occurrence for a Judge having found one ground on which to base his judgment, to disregard altogether other grounds which may be raised, and it seems to me unreasonable to say that a jury may not do the same. I am, therefore, of opinion that the findings of the jury cannot be said to exclude all other negligence than that specifically found, and that defendants, therefore, should not be entitled to judgment on that ground, but that a jury should have an opportunity of finding specifically on the point.

The defendants contend that the Judge should not have left the assessment of damages to the jury, since, under sec. 3 of ch. 48 of the Consolidated Ordinances, the damages are to be determined by the Court. I am of opinion that there is nothing in this contention. In my opinion, the "Court" in the present case consisted of a Judge and jury, and the jury was the proper part of the Court to fix the amount of damages. If the term "Court" has not this meaning, then I agree with the trial Judge that the Ordinance contravenes the provisions of sec. 88 (2) of the North-West Territories Act, under which, where there is a jury, all questions of fact must be determined by it, and would therefore be invalid.

The appeal should, in my opinion, be allowed with costs, the judgment below set aside and a new trial ordered, the costs

of the first trial to be costs to the successful party on the new trial.

SIFTON, C.J., and PRENDERGAST, J., agreed with the judgment of HARVEY, J.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. OCTOBER 3RD, 1905.

CHAMBERS.

TURNER v. VAN METER.

Parties—Action to Set aside Fraudulent Conveyance—Grantor—Partnership—Motion to Strike out Name of Defendant—Claim of Some Plaintiffs but not of all—Costs.

Application by defendant Blades to strike out his name as a defendant, upon the ground that no relief was sought as against him.

F. C. Jamieson, Strathcona, for applicant.

O. M. Biggar, Edmonton, for plaintiffs.

SCOTT, J.:—The object of the action appears to be: (1) to obtain a declaration that defendant B. A. Van Meter by his conduct is estopped from denying that he was a partner of the firm of Van Meter & Blades at the time the debts due by that firm to the plaintiffs were contracted; (2) to set aside as fraudulent and void as against creditors of that firm conveyances of certain real estate, the property of the firm, made by defendant Blades to defendant B. A. Van Meter, and of certain cattle, the property of defendants Blades and F. C. Van Meter, made to the same defendant; and (3) to compel defendant F. C. Van Meter to convey to plaintiff Byers, for the purposes of the trusts under the assignment to him

for the benefit of the creditors of that firm, certain lands purchased by that defendant from the Canadian Pacific Railway Company. There is also an allegation in the statement of claim that plaintiffs Turner & Co. and G. F. & J. Galt are execution creditors of defendants F. C. Van Meter and Blades, two of the members of that firm, and that defendants are indebted to plaintiffs Whitla & Co. and Wood & Co., in certain sums, and plaintiffs claim payment by defendant B. A. Van Meter of their respective claims.

Such being the nature of the action, it is, I think, apparent that no relief is claimed against defendant Blades, nor, in my view, is there anything in the statement of claim to shew that he is a necessary party to the action. The fact that he made the transfers which are charged to be fraudulent is not sufficient to entitle plaintiffs to make him a party defendant: see MacDonald v. Dunlop, 2 Terr. L. R. 177, and the authorities there referred to.

Counsel for plaintiffs contended that in case I found that defendant Blades was not a necessary party to the action as now framed, leave should be given to amend the statement of claim by claiming payment from him of the amounts due plaintiffs.

I was at one time inclined to the view that such leave should be given, but, upon further consideration, I am of opinion that it should be refused.

Two of the plaintiff firms have already recovered judgment against him, and therefore their right to enforce payment of their claims by him has already been established. The claim for payment by him would, therefore, be a claim of only some of the plaintiffs, and not of all. Faulds v. Faulds, 17 P. R. 480, and the English cases there referred to, shew that such a claim should not be joined.

Order to go striking out the name of defendant Blades—leave to amend refused. As the application was not made until after defence filed, no costs will be allowed him: see Vallance v. Birmingham, 2 Ch. D. 369.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. OCTOBER 3RD, 1905.

CHAMBERS.

ROSS BROTHERS LIMITED v. PEARSON.

Appeal—Supreme Court of Canada—Extension of Time—Grounds of Proposed Appeal—Alteration in Position of Parties—Transfer of Subject Matter.

Application by plaintiffs for an extension of time for appealing to the Supreme Court of Canada from the judgment of the Court in banc (1 W. L. R. 338) allowing an appeal from the judgment of SIFTON, C.J., in favour of plaintiffs in an interpleader issue.

O. M. Biggar, Edmonton, for plaintiffs.

C. F. Newell, Edmonton, and I. S. Cowan, Edmonton, for defendant.

SCOTT, J.:—In the issue plaintiffs affirmed and defendant denied that a certain steamboat seized by the deputy sheriff under an execution upon a judgment recovered by defendant against one Twiss was, at the time of such seizure, as against defendant, the property of plaintiffs as mortgagees thereof under a chattel mortgage made to them by Twiss, the execution debtor.

The judgment of the Court in banc allowing the appeal was delivered on 18th April, 1905. Prior to the expiration of the time for appealing therefrom, viz., on 2nd May following, a judgment was delivered by the Supreme Court of Canada upon an appeal before it in the case of Benallack v. Bank of British North America, 36 S. C. R. 120, which decided the main question involved in this issue contrary to the decision of the Court in banc. I was not present at the sittings of the latter Court when that judgment was delivered, nor have I been able to refer to the reasons for it, but I am inclined to think that had the judgment in the case referred to been delivered before the Court in banc gave judgment and been

brought to its notice, its judgment would have been in favour of plaintiffs. It appears that plaintiffs' advocates did not become aware of the effect of the judgment in that case until it appeared in the number of the Supreme Court reports which reached Edmonton in the ordinary course of distribution about 19th July last.

The steamboat in question remained in the deputy sheriff's custody under seizure until about 27th April, 1904, when, pursuant to the terms of the interpleader order, it was delivered to plaintiffs pending adjudication upon the interpleader issue, they having given security to the deputy sheriff for its return. About 1st March, 1905, when the appeal to the Court in banc was pending, plaintiffs advertised it for sale by auction under their mortgage, and at that sale they themselves became the purchasers. About 17th March, before the judgment of the Court in banc was delivered, they resold it to the Edmonton Coal Company, but, although the sale to the latter company was completed at that time and the steamboat delivered under it, the purchase money had not been paid at the date of this application. A few days after the delivery of the judgment of the Court in banc, the deputy sheriff resumed possession of the steamboat under the executions in his hands, and shortly afterwards plaintiffs placed in his hands an execution upon a judgment recovered by them against Twiss, presumably for the debt secured by their chattel mortgage. Having done this, they, through their advocates, entered into negotiations with defendant's advocate and the advocates for one MacDonald, another execution creditor of Twiss, for the release of the steamboat from their executions in order to avoid a sale thereof under the executions. The result of these negotiations was that the defendant consented to release the steamboat on payment by plaintiffs of $300 on account of his judgment for $348, and MacDonald consented to release on payment by them of $60 on account of his judgment for $101.85, and on or about 17th June plaintiffs issued their cheques for these amounts, and afterwards caused them to be delivered to defendant and MacDonald, whereupon they released the steamboat from their respective executions.

It appears that the only matter connected with the interpleader issue which remained unsettled at the date of this application was defendant's costs of the appeal to the Court in banc, they not having yet been paid.

It further appears that during the negotiations for the release of the steamboat one of the plaintiffs' advocates stated to the defendant's advocate that if the amount in dispute were larger, his firm would advise an appeal to the Supreme Court of Canada.

This application is based solely on the ground that since the judgment sought to be appealed against was delivered there has been a contrary decision of the higher Court.

It appears to be open to serious question whether that fact alone is a sufficient ground for granting the leave applied for. In Craig v. Phillips, 7 Ch. D. 250, Baggallay, L.J., says at p. 252: "I do not mean to say that the Court would not in any case where the 12 months had elapsed enlarge the time to appeal on the ground that there had been a contrary decision of a superior court on a point of law, but there must be circumstances of a very special character." In the same case Thesiger, L.J., says at p. 253: "I give no opinion whether if there were a clear decision of a court of appeal overruling previous decisions, this discretion ought not in some cases to be exercised."

Apart from this question, I am of opinion that leave to appeal should not now be granted. The main question involved in the issue was the construction of an Ordinance which had not before received judicial construction. After the judgment was pronounced plaintiffs' advocates appear to have considered the propriety of appealing against it and to have decided not to do so. They then proceeded to buy out the defendant's interest in the subject matter of the action, the result being that he can no longer claim any interest in it. If an appeal were taken, and it were sustained, the effect would probably be that he never had any interest in it, but I cannot now assume that that would be the result of an appeal or that it must necessarily be decided in favour of plaintiffs. Not only has the defendant parted with his interest, but plaintiffs have also parted with theirs. It may be that the sale by them to the coal company was at one time subject to the defendant's interest, but it is no longer so since he released it from his execution.

The purchasing company are entitled to hold it as against both the parties to the issue, the result being that by the plaintiffs' acts the subject matter is gone beyond recall, and in case defendant succeeded upon an appeal (and that contingency should not be ignored), his interest could not be restored to him.

In Craig v. Phillips (above) Jessel, M.R., says at p. 250, in answer to the contention of counsel that the Court had not unfrequently given leave to appeal after the proper time had expired when there had been a subsequent decision of the Court of Appeal altering the law as it was previously understood: "Not unless the property is still in Court or in some manner under distribution."

The application is refused with costs.

MANITOBA.

DUBUC, C.J. OCTOBER 21ST, 1905.

TRIAL.

NORTH-WEST THRESHER CO. v. DARRELL.

Sale of Goods — Machinery — Warranty—Defects—Implied Warranty—Damages—Costs.

Action to recover the amount of certain promissory notes given by defendant in payment of a threshing outfit purchased from plaintiffs. The defendant set up that the engine was not as represented and warranted to be; he claimed damages for breach of warranty, and averred that plaintiffs were not entitled to recover anything in respect of the engine.

T. L. Metcalfe and E. E. Sharpe, for plaintiffs.

C. P. Wilson and G. W. Baker, for defendant.

DUBUC, C.J.:—The outfit comprised an engine with straw burning parts, a separator, a self feeder, a straw stacker, and other attachments. The contract is on a printed form of the plaintiff company, and contains a warranty. There is a clause in it stating that the contract is divisible and that each article is ordered and sold at a separate fixed price. The separator and other attachments seemed to have worked satisfactorily; the engine alone was found defective.

The first order and contract was made on 27th March, 1903, but another one similar, dated 9th May, 1903, was substituted. It provides for the sale of one New Giant self-steering traction engine rated at 25 horse power, with straw burn-

ing parts, etc., to be delivered on or about the 25th May, 1903. The delivery did not take place until 11th September. The New Giant engine first delivered under the contract was defective in this, that sufficient steam could not be raised with straw as fuel. Defendant notified plaintiffs' agent, who sent experts, but they failed to make it work with burning straw. Defendant had to use coal to make it work. After a few weeks, during which defendant incurred large expenses in using coal, plaintiffs took back the engine, and substituted a North-West engine. This engine, which was received on 22nd October, worked satisfactorily at threshing, but in moving from place to place it could not properly draw the separator on rough ground. Cogs were broken in some of the wheels, the counter-shaft was bent, and time was lost in repairing the same, and in getting new pieces to replace those broken. After using the North-West engine for about 6 weeks, defendant abandoned it and hired a J. I. Case engine, which worked satisfactorily at threshing, and with which the separator could be pulled without difficulty.

There is in the contract a warranty providing that the machinery is warranted to be made of good materials, well constructed, and with proper use and management to do as good work as any other of the same size and rated capacity made for the same purpose, and that if found unsatisfactory, written notice should be given within three days, by registered letter to the company at its home office, Stillwater, Wis., and the company will be allowed to furnish another machine or return the notes, and if the company shall furnish another machine, the terms of the warranty shall be held to be fulfilled, and the company shall be subject to no further liability. The use of the machinery after the expiration of the time named in the warranty shall be evidence of the fulfilment of the warranty and full satisfaction to the purchaser.

Plaintiffs rely on that express warranty, and contend that, under it, the supplying of the second engine was an absolute fulfilment of the said warranty, and that the defendant can claim nothing in respect of any defect in the second engine, or in the first one. I cannot accept that proposition. The provision would be illusory, if, after having firstly delivered a bad and defective machine plaintiffs could exonerate themselves by substituting another one just as bad or even worse. That could not have been the intent and understanding of the parties at the time of entering into the contract.

Plaintiffs contend that the express warranty in the contract excludes any implied warranty, and that no evidence was admissible under any implied warranty. But the Sale of Goods Act, R. S. M. ch. 152, sec. 16, sub-sec. (d), says that an express warranty or condition does not negative a warranty or condition implied by the Act unless inconsistent therewith.

Section 15 enacts that when there is a contract for sale of goods by description, there is an implied condition that the goods shall correspond with the description, and sub-sec. (a) of sec. 16 provides that when the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, there is an implied condition that the goods shall be reasonably fit for such purpose.

In Varley v. Whipp, [1900] 1 Q. B. 513, it was held that if a man agrees to buy a second-hand reaping machine which he has never seen, but which the seller assures him was new the previous year, and to have been used to cut only about 50 acres, it is a sale by description, and if the machine does not correspond with the description, the buyer may reject it. Channell, J., said in that case: "The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone."

In this case, Flamer, plaintiffs' agent, who sold the machine to defendant, resides at Birtle, where the machine was to be used, and knew that defendant wanted the outfit for the purpose of threshing for the farmers in the neighbouring localities. There was then the implied warranty that the engine was fit for that purpose, and, as it could not raise sufficient steam by using straw as fuel, as provided for in the contract, it is clear that the engine was not fit for the purpose. This was practically admitted by plaintiffs when, after trial by their experts, they substituted another engine. I therefore think that, under the implied warranty, defendant is entitled to claim from plaintiffs the damages he has sustained by reason of the time lost, cost of coal, and other extra expenses incurred in connection with the first engine.

As to the second engine, it was found to thresh satisfactorily, and to be able to pull the separator on ordinary ground; the only difficulty was that on rough and frozen ground the gearing was not strong enough to permit the engine to carry itself with the separator attached. There is no doubt that there were some weak parts on the engine. But can it be said to be unfit for the purpose for which it was bought? It

does not seem that the implied warranty was such as to insure that the engine would be able to pull the separator over all kinds of grounds, in mud holes or ploughed patches solidly frozen. It would not be reasonable to suppose that, in the absence of any specific provision to that effect, such must have been the understanding between the parties, or that defendant had a right to expect that the engine would be able to perform such difficult work. It appears that defendant's men had no trouble in moving the separator with the Case engine, but there is nothing in the evidence to shew that it was driven over such rough ground as that over which the previous engine had been broken. One of the witnesses, who had years of experience with threshing machines, said that, even with a good engine, he had in some instances to have the separator drawn by horses. This shews that a reasonable discretion had to be exercised in such as well as in other matters. While holding that the supplying of the second engine was not a complete fulfilment of the warranty, I cannot find that the engine was unfit for the purpose. Then defendant did not notify plaintiffs of its defect within the time mentioned in the warranty, he kept it and used it for 6 weeks before he abandoned it. Besides this, plaintiffs have produced a certificate signed by defendant, dated 29th October, to the effect that the second engine had been properly put in order by their expert, and that it worked satisfactorily, and on 31st October he wrote to plaintiffs as follows: "I will be satisfied if you will make good the coal bill and the pinion, and waive claim to lost time." Under such circumstances, I do not see how defendant can exonerate himself from liability on the notes sued on.

As to the damages sustained by defendant in connection with the first engine, I think he is entitled to recover the price of coal used and the expense of hauling it: 30½ tons of coal at $9 a ton, $274.50; $2 a ton for hauling it, $61; making altogether $335.50.

As to the loss of time, defendant says that with a good engine he could have earned $65 a day; expenses with straw as fuel $28 a day; clear profit $37; but he was not there himself; Falconer, his man in charge of the outfit, says that with a good engine they could have threshed over 2,000 bushels a day and earned $81, expenses $28, profit $53; but this could not be done when they had to move, and with other contingencies. I think $40 a day should be allowed for the 5 days

claimed to have been lost, making $200. This added to the expenses for coal gives a total of $535.50, which should be deducted from the amount of the notes sued on. As the notes bear interest, I think interest on the sum of $535.50 should be allowed to defendant from 1st November, 1903, at 10 per cent.

There should be judgment for plaintiffs for the balance of the aggregate amount of the notes sued on. As defendant has partly succeeded in his defence, and taking into consideration the peculiar circumstances of the case, I think the judgment should be without costs.

MANITOBA.

PERDUE, J. OCTOBER 23RD, 1905.

CHAMBERS.

SCHWEIGER v. VINEBERG.

Pleading — Statement of Defence — Motion to Strike out — Embarrassment—Rules of Pleading.

Application by plaintiffs to strike out parts of the statement of defence as embarrassing.

Plaintiffs sued for the price of goods alleged to have been sold and delivered to defendant, amounting to £186 1s. 10d. or $905.

In the alternative plaintiffs claimed damages for breach of contract by defendant for non-acceptance of the goods and non-payment for the same. Defendant filed a statement of defence and counterclaim.

Plaintiffs on this motion asked to have struck out as embarrassing part of the 3rd paragraph and all of the 5th, 6th, and 7th paragraphs of the statement of defence.

H. Phillipps, for plaintiffs.

A. E. Hoskin, for defendant.

PERDUE, J.:—By the 3rd paragraph of her defence defendant set up that she has no knowledge of the goods re-

ferred to in the statement of claim and denies that she purchased or received the same from plaintiffs. Defendant then, in the same paragraph, proceeds to say, "and the defendant is informed that the alleged claim of the plaintiffs for the said brushes (part of the goods), if any, arose prior to the time when the defendant started in business, and if the same exists at all, which the defendant does not admit, it is against the estate of the defendant's late husband and not against the defendant." The plaintiffs ask to have this portion of the paragraph struck out.

Paragraph 5 is as follows:—"The defendant says that she never agreed to purchase mufflers from the plaintiffs for the price and sum, including packing, freight, and insurance, of £129 15s. 1d., as alleged in said paragraph 3 of the plaintiffs' statement of claim, and that she never received the same from the plaintiffs or any part thereof."

Paragraph 6 is in exactly the same form as the preceding paragraph, except only that it refers to another item of plaintiffs' claim.

Paragraph 7 is as follows:—"The defendant says that if she ordered the mother of pearl buttons from the plaintiffs for the price and sum, including freight and insurance, of £5 1s. 10d., as alleged in said paragraph 3 of the said plaintiffs' statement of claim, which the defendant does not admit, then the same were ordered by the defendant as a part of the goods referred to in paragraph 8 hereof, and were so ordered by the defendant, together with a large number of other goods referred to in said paragraph 8, to be shipped by the plaintiffs to the defendant in the month of June, 1904, and the plaintiffs did not supply the said goods as ordered by the defendant and did not ship the same during the said month of June, but the plaintiffs, in alleged performance of the said contract and agreement, shipped to the defendants on the 16th day of August, 1904, a large quantity of goods contained in three cases, many of which goods had never been ordered by the defendant, and in such shipment the plaintiffs omitted many of the goods which had been ordered by the defendant and goods of a class ordered by the defendant were mixed with other goods which had never been ordered by the defendant, and the defendant absolutely refused to receive or accept them, or any of them, and notified the plaintiffs of such refusal."

Paragraph 8, referred to in paragraph 7, is part of the defendant's counterclaim, in which she says that she ordered certain goods from the plaintiffs, giving the particulars and prices of the goods, which the plaintiffs agreed to supply and to ship in June, 1904. These goods are not described in the same manner as the goods mentioned in the statement of claim, and there is no allegation that they are the same.

The portion of paragraph 3 not objected to denies the purchase or receipt of part of the goods sued for, and affords, if true, a complete defence to that part of plaintiffs' claim.

The defendant, however, goes on in the same paragraph to raise a collateral issue, that the same part of the plaintiffs' claim, if it exists at all, is against the estate of her late husband and not against her.

I think this is objectionable, for two reasons:—First, the facts set up are not alleged as facts, but are stated as an information; second, the issue to be tried in this case is whether the defendant is liable upon the alleged contract sued on or not, and the defendant should not seek to raise a side issue as to whether some one else is liable or not. As to the first reason I would refer to the King's Bench Act, Rule 306, which directs that pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved. For the defendant to say that she "is informed" as to a certain fact is to refer to evidence of the fact which she may adduce, not to allege the matter as a fact. In the paragraph in question the defendant further guards herself from alleging the fact by declaring that she does not admit it. If she denies that she bought or received the goods and can prove her contention it is hardly to be expected that she would then proceed to prove the rest of the paragraph and shew who had made the purchase. I think the portion objected to is improperly pleaded, seeks to raise an immaterial issue, and is therefore embarrassing. I would refer to Odgers on Pleading, pp. 103, 106, and to Jones v. Turner, W. N. 1875, p. 239.

The objections to paragraph 5 and 6 are the same. It is claimed that each of these paragraphs contains an evasive denial which may include an affirmative. In the case of paragraph 5 above cited, it is argued that the paragraph

would be true even if the fact was that defendant had purchased the goods for £129, instead of £129 15s. 1d.; in other words, that the paragraph covers too much in the denial and contains a negative pregnant.

Under the English practice this would be objectionable; Odgers on Pleading, p. 154; Annual Pr. 1905, p. 259.

By the King's Bench Act, Rule 290, the defendant must in his denials of allegations of fact, "deny specifically wherever possible, but no allegation in a statement of claim shall be held to be admitted because the party defendant has not denied the same." The provision as to specific denial is taken from the English Rules of the Supreme Court (O. 19, rr. 17, 19), but the effect of non-denial of an allegation in the pleading of the opposite party operates under the English Rules as an admission (O. 19, r. 13). Although under our Rules the silence of the defendant as to a material allegation in the statement of claim will not, subject to the exceptions mentioned in the Rules, relieve the plaintiff from the necessity of proving it, still where the defendant does deny the allegation he must conform to the Rule and "deny specifically." The defendant must, therefore, make it clear to the plaintiffs what her denial is. She must not deny evasively, or ambiguously, and should direct her denial to the point of substance; see Annual Prac., 1905, pp. 257-259. The manner in which the defendant has framed her denials in paragraphs 5 and 6 is open to the objection pointed out in Tildesley v. Harper, 7 Ch. D. 403, and discussed in the above text books.

The grounds of objection in paragraph 7, stated in the notice of motion, are, "because the paragraph is hypothetical and contains no direct allegation of fact . . . and because the said paragraph does not allege whether it is claimed by the defendant that the shipment of the goods in question during the month of June, 1904, was a condition precedent to the plaintiffs' right to recover in this action and because the said paragraph alleges merely the evidence in proof of the facts."

The defence set up in this paragraph purports to be pleaded in confession and avoidance. Such a defence should admit the purchase of the goods either directly or impliedly, and should then shew the grounds upon which the acceptance of them was refused; Odgers, p. 137. To make the admission in a hypothetical form was objectionable under the

old rules of pleading; see Griffiths v. Eyles, 1 B. & P. 413. The defendant in the present case must know or can readily ascertain whether she purchased the goods or not, and in setting up a plea in confession and avoidance she should admit the fact of the purchase and shew reasons why she was justified in refusing to accept. She would then comply with the spirit and meaning of Rules 287 and 290. If the defendant is not aware of the facts, or if they are doubtful, I see no objection to her saying in effect, "if the facts are as alleged by the plaintiffs, the truth of which I do not know and do not admit, then I say," etc.; offering her justification. It is better, however, to raise such defence by an admission, with an avoidance. The admission of facts for the purpose of a defence in confession and avoidance has no conclusive operation against a defendant, if the defendant has already traversed the facts confessed; see Odgers, p. 160. Although the plea in the present case is not well framed as a plea of confession and avoidance, I would not interfere with it upon that ground, as the objection is more one of technicality than of merits.

I think, however, that paragraph 7, as now framed, is objectionable upon other grounds.

In the first place, the defence sought to be raised by this paragraph should be specifically directed to the contract referred to in the statement of claim. Any terms or conditions of that contract material to the defence intended to be set up, and not set out by the plaintiffs, should be averred by the defendant, and then she might shew a breach of those or some of them upon the plaintiffs' part, or some other lawful excuse justifying her in her refusal to accept the goods. Here, the defendant alleges that the goods, if ordered at all, were ordered under a contract which is in no way identified with that sued upon, and which may differ materially in time, place, and every other respect from the contract to which plaintiffs refer.

The defendant should plead to the contract sued upon, and if that contract contained the condition referred to in the paragraph, it should be so alleged. As the paragraph is framed it is doubtful whether the shipment of goods mentioned in it was made in pursuance of the contract sued upon or in performance of the contract mentioned in paragraph 8 of the statement of defence. Further, there are ap-

parently two defences involved in the same paragraph, one setting up the non-shipment during the month of June, the other alleging a mixing in of goods not ordered and the omission of many of the goods which had been ordered. The first part of the paragraph appears to relate to the item of pearl buttons only, but the latter part is apparently intended as a defence to the whole action.

For the reasons above given I think paragraph 7 is so framed as to prejudice and embarrass the fair trial of the action.

It was also contended by the plaintiffs' counsel that the defence set up in paragraph 7 was inconsistent with the other defences raised and should be struck out. It appears to me, however, that a defendant may by his statement of defence, without leave, set up as many distinct and separate and therefore inconsistent defences as he may think proper, subject only to the provisions of Rule 326 as to striking out as embarrassing. I would refer to Rules 309 and 313, also to Berdan v. Greenwood, 3 Ex. D. 255; Hawkesley v. Bradshaw, 5 Q. B. D. 302; Re Morgan, 35 Ch. D. 492; Child v. Stemning, 5 Ch. D. 695. But, in alternative pleading, facts belonging to alternative cases should not be mixed up, but should be stated separately so as to shew on what facts each alternative relief is claimed: Rule 309; Davy v. Garrett, 7 Ch. D. 489; Re Morgan, 35 Ch. D. 497.

I order that the part of paragraph 3 complained of be struck out; that paragraphs 5 and 6 be amended, so that they may properly traverse the matters intended to be traversed; and that paragraph 7 be amended so as to raise clearly and distinctly the defences intended to be raised in conformity with the rules of pleading; otherwise, the same to be struck out.

The amendments directed are to be made within 7 days after the issue of this order.

The costs of this application and occasioned by the amendments to be costs in the cause to the plaintiffs.

BRITISH COLUMBIA.

(NELSON.)

IRVING, J. OCTOBER 13TH, 1905.

CHAMBERS.

REX v. NEIDERSTADT.

Constitutional Law — British Columbia Liquor License Act —Brewer Licensed under Dominion Inland Revenue Act —Sale of Beer without Provincial License—Conviction— Validity.

Application by defendant for a writ of certiorari to remove into the Supreme Court a conviction made by J. F. Armstrong, stipendiary magistrate, at Cranbrook, whereby the applicant was convicted of an offence under the Liquor License Act, 1900, viz., of having sold intoxicating liquors in quantities of less than two gallons, without having first obtained a license under sec. 66. The defendant was a brewer, holding a license as such under the Inland Revenue Act, R. S. C. 1886 ch. 34, authorizing him to carry on the trade or business of a brewer of malt liquors in his brewery at Moyie, B.C. The defendant, relying on the authority of his Dominion license, made the sales in respect of which he was convicted.

J. O'Shea, for defendant. Defendant, being licensed under the Inland Revenue Act to carry on the trade or business of a brewer, is entitled to manufacture and sell, and the provincial Liquor License Act can have no application to him. If that Act applies, brewers would be unable to sell, notwithstanding their Dominion license, unless they had also obtained a provincial license; and this might be refused them. The province undoubtedly has the right to fix a license for brewers as a matter of taxation, but not as a matter of regulation of the trade: Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario, [1897] A. C. 231; Severn v. The Queen, 2 S. C. R. 70; Regina v. Halliday, 21 A. R. 42; Regina v. Scott, 34 U. C. R. 20.

R. S. Lennie, for the Crown. Regina v. Halliday and the cases there referred to shew that legislation for regulating the sale of liquor is exclusively within the jurisdiction of the provincial legislatures. Section 66 of the Liquor

License Act, 1900, plainly prohibits the sale of liquor without a license obtained under that Act, and this legislation is intra vires: see Lefroy on Legislative Powers in Canada, p. 719, and cases there referred to. Section 174 of the Inland Revenue Act, R. S. C. 1886 ch. 34, under which the applicant's license was issued, is intended to provide for licensing the manufacture merely of an article subject to excise duties.

IRVING, J.:—In my opinion this application must be dismissed, on the authority of the cases of Brewers and Maltsters' Association of Ontario v. Attorney-Gene al for Ontario, [1897] A. C. 231. Under sub-sec. 9 of sec. 92 of the British North America Act, the provincial legislature has power to require a brewer, duly licensed as such by the Dominion Government, to take out a license, under the provincial statute, to sell intoxicating liquor manufactured by such brewer. The above mentioned case is so much on all fours with this case that it seems to me only necessary to call attention to the decision rendered by the Judicial Committee in the appeal taken by the Brewers and Maltsters' Association of Ontario under the Ontario Act. It may seem anomalous that brewers should be licensed to carry on the trade of brewing, and at the same time be subject to the provincial legislature, but with that the Court is not concerned. The statute under which the conviction was made being intra vires, the conviction must be upheld.

Application dismissed.

NORTH-WEST TERRITORIES.

(REGINA.)

OCTOBER 16TH, 1905.

FULL COURT.

SEELEY v. IMPERIAL ELEVATOR CO.

Bailment — Storage of Wheat — Conversion — Dispute as to Quantity Redelivered — Evidence — Certificate of Weighmaster.

Appeal by plaintiff from judgment of NEWLANDS, J, dismissing action brought to recover the value of 209

bushels of wheat, being a portion of 701 bushels which he placed for storage in defendants' elevator.

C. E. D. Wood, Regina, and A. L. Gordon, Regina, for plaintiff.

A. Ross, Regina, for defendants.

The judgment of the Court (SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, and HARVEY, JJ.), was delivered by

SIFTON, C.J.:—Plaintiff sues defendants for the value of 209 bushels of wheat, being a portion of 701 bushels which he placed for storage in defendants' elevator, and being, according to his claim, the remainder after giving credit for 479 bushels which, he admits, were received by him and shipped to Fort William.

The trial Judge dismissed the action with costs, and upon the evidence adduced I fail to see how he could possibly have done otherwise.

The witness who loaded the car for Fort William gave positive evidence, corroborated by his memorandum of weights, that he had loaded 701 bushels of wheat in the car, which was received and accepted by plaintiff. An attempt was made to shew that this car on arrival at its destination only contained 479 bushels, by the production of what was alleged to be a certificate of the weighmaster, but this evidence was clearly inadmissible under any circumstances, the document tendered having neither the signature nor the seal of the weighmaster, as required by statute, and there was therefore no evidence before the Court that the car did not on arrival at destination contain 701 bushels of wheat. The only other contention of plaintiff was that the portion of the car used could not have contained 701 bushels of wheat unless it had been piled higher in the car than some of the witnesses thought it was. No witness swore positively to the size of the car or the height of the wheat in it, and it would be absurd for the Court to disregard positive sworn testimony of an admittedly honest witness in favour of the guessing of persons who had made no measurements. The appeal should therefore be dismissed with costs.

NORTH-WEST TERRITORIES.

(REGINA.)

OCTOBER 16TH, 1905.

FULL COURT.

DAKOTA LUMBER CO. v. RINDERKNECHT.

Foreign Judgment — Action on — Jurisdiction of Foreign Court—State Court—Subject of "Country" — Resident of another Country—Submitting to Jurisdiction.

Appeal by defendant from judgment of WETMORE, J., 1 W. L. R. 481, in favour of plaintiffs in an action upon a judgment recovered by plaintiffs against defendant, in 1904, by default of appearance, in the Circuit Court of the 5th Judicial District of the State of South Dakota.

H. A. Robson, Winnipeg, for appellant.

C. C. McCaul, K.C., for plaintiffs

The judgment of the Court (SIFTON, C.J., SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ.), was delivered by

SCOTT, J.:—The facts found by the trial Judge, in so far as they appear to be material to this appeal, are as follows.

The action in which the judgment sued upon was recovered was brought upon a mortgage made by defendant to plaintiffs upon lands in South Dakota. The judgment, following the prayer of the claim, ordered and decreed that the lands should be sold to satisfy the mortgage. The amount realized from the sale was insufficient to satisfy the amount of the mortgage, and plaintiffs, in accordance with the practice of the Court, recovered a personal judgment against defendant for $490, being the amount of the deficiency. The defendant was born in the State of Wisconsin. He removed to South Dakota, where he was residing at the time the mortgage was executed. About 14 years ago he removed to the North-West Territories, where he has resided ever since that time. It is not shewn that he became naturalized here, and the trial Judge has found that he is still a subject of the United States.

The trial Judge held that plaintiffs were entitled to recover upon the judgment by reason of the fact that defendant is a subject of the United States, and therefore bound by the judgment of its Court against him.

Schibsby v. Westenholz, L. R. 6 Q. B. 155, and Rousillon v. Rousillon, 49 L.J. Ch. 338, which are referred to by the trial Judge as supporting his judgment, were actions upon judgments recovered in France against persons who were neither resident in nor subjects of that country. Blackburn, J., in the first mentioned case, and Fry, J., in the last mentioned case, lay down the principle, deduced from the authorities referred to by them, that if a defendant was at the time of the judgment a subject of the country whose judgment is sought to be enforced he would be bound by it.

It is important to consider what is meant by the term "country" which appears in the definition of this prinicple.

In Dicey on Conflict of Laws, Am. ed., at pp. 66, 67, the following is stated: "The word 'country' has among its numerous significations the two following meanings which require to be carefully distinguished from one another—(1) 'A country, in what may be called the political sense of the word, means the whole of the district or territory subject to the sovereign power, such as France, Italy, the United States, or the British Empire.' (2) 'A country, in what may be called the legal sense of the word, means a district or territory which (whether it constitutes the whole or a part only of the territory subject to one sovereign) is the whole of a territory subject to one system of law, such for example as England, Scotland, or Ireland, or as each of the States which collectively make up the United States. For the term 'country' in the legal sense of the word there is no satisfactory English substitute. If the use of a new term is allowable, a country might, in this sense, be called a 'law district.'—Thus France, Italy, and Belgium each constitutes one separate country in both senses of the term. France (including, of course, in that term French dependencies) is one country in the political sense of the word and is also one country or law district in the legal sense of the term. On the other hand, the British Empire, while constituting one country, realm, or state in the political sense of the term 'country,' consists of a large number of countries in the legal sense of the word, since England, Scotland, Ireland,

the Isle of Man, the different colonies, etc., are in this sense separate countries or law districts."

Douglas v. Forrest, 4 Bing. 686, was an action brought in England against the executor of one Hunter upon a judgment recovered in Scotland in 1802 against the deceased, a Scotchman, who left Scotland for India in 1799, where he remained until his death in 1817. It was held that the action would lie, but Best, C.J., in his judgment says: "We confine our judgment to a case where a party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected."

In Cowan v. Braidwood, 1 M. & G. 882, which was an action upon a judgment recovered in Scotland, a plea was held bad because it did not allege that defendant was not resident in Scotland or was not subject to the laws of that country during the time the proceedings there were had against him. Tindal, C.J., says at p. 891: "But here there is no statement that defendant was not resident in Scotland or that he was not subject to the laws of that country during the time that these proceedings were had against him."

To my mind it is apparent that in the cases last referred to the term "country" was not intended to refer to the whole of the British Empire, but merely to one of what Mr. Dicey terms the "law districts" thereof. If the other meaning were intended, it would follow that a British subject, so long as he remained such, could be sued in any of His Majesty's Courts in any part of the Empire. It could not be reasonably contended that a person who had always resided in England would be subject to the laws applicable to Scotland alone, except perhaps in respect of any property he might possess there. As well might it be said that being a subject of His Majesty and owing allegiance to him he would be subject to the local laws in force in every district of the Empire; or, to bring the illustration nearer home, that a British subject residing in this province is subject not only to the laws of each province of the Dominion but also to those of all parts of the Empire.

Turnbull v. Walker, 67 L. T. N. S. 767, shews that such a contention could not be upheld. The action was upon a judgment recovered by the plaintiff in the Supreme Court

of New Zealand against the defendants, who resided in England. Wright, J., in his judgment at p. 769, says: "No merely local statute could, in my opinion, enable the Court to entertain the action against the absent Englishman who was neither a native of New Zealand nor domiciled there nor present there when the action was begun or at any time during its continuance, and who had not appeared or in any way submitted to its jurisdiction. . . . Schibsby v. Westenholz appears to govern this case. . . . I should add that the principles laid down in Schibsby v. Westenholz . . . are in accordance with the authorities collected in Story's Conflict of Laws."

It would thus appear that a British subject is subject only to the laws affecting the Empire as a whole and those of the particular law district in which he resides, and perhaps also (according to Douglas v. Forrest) those of the law district in which he was born.

By analogy a citizen of the United States would be subject to the Federal laws and those of the State in which he resides, but not to those of any other State, except, perhaps, that in which he was born.

In Pennoyer v. Neff, 95 U. S. R. 748, it was held that no State can exercise direct jurisdiction or authority over persons or property without its territory, and that no tribunal established by it can extend its process beyond its territory so as to subject either persons or property to its decisions, and that (quoting Story on Conflict of Laws) "any exercise of authority beyond this limit is a mere nullity and incapable of binding such persons or property in any other tribunal."

This case, in deciding that a State Court cannot under any circumstances exercise any authority over any person who is beyond the limits of its territory, or bind him by its judgments, is not in accord with our laws respecting the powers of the Courts of the different law districts of the Empire. It may be that the decision rests upon limitations contained in the constitution of the State.

In a recent Ontario case, viz., Deacon v. Chadwick, 1 O. L. R. 346, it was held that an action would not lie upon a judgment recovered in Manitoba against a defendant residing in Ontario who had not appeared in the action or submitted to the jurisdiction of the Court. Armour, C.J., who

delivered the judgment of the Court, relied upon Schibsby v. Westenholz, Turnbull v. Walker, and Pennoyer v. Neff, as supporting this finding.

In Fowler v. Vail, 4 A. R. 267, the Court of Appeal in Ontario would appear at first sight to have reached a different conclusion, but a careful perusal of the judgment leaves it open to doubt whether such was the case. The action was upon a judgment recovered in the State of New York. A plea that the defendant was not, at the commencement of the action, or at any time from thence to the recovery of the judgment, resident or domiciled within the jurisdiction of the Court or within the jurisdiction of the United States, was held bad because it did not allege that the defendant was not a subject of the foreign country. It is true that Patterson, J.A., refers to the fact that the plea did not negative the position that the defendant may have been a citizen of the United States, but he agrees with Gwynne, J., in the Court below, who holds that it is bad in that it does not allege that defendant was not a subject of the foreign country. What is meant by the term "country," i.e., the State of New York, or the United States, does not clearly appear from the judgment. If the latter, the judgment would be to my mind at variance with the principles laid down in the cases to which I have referred or which may reasonably be deduced therefrom.

It was contended on behalf of the plaintiffs that the judgment bound the defendant because he had impliedly submitted himself to the jurisdiction of the Court.

The ground of this contention is, that defendant, at the time he gave the mortgage, which contained a stipulation that it may be enforced in the manner provided by the statutes of the State, must be taken to have been aware of the fact that those statutes provided that in a proceeding upon the mortgage the plaintiffs would be entitled to a personal judgment against him for any deficiency arising from the sale of the lands.

One answer to this contention is that it is not shewn that the statutes referred to were in force at the time the mortgage was given. Apart from that, I doubt whether such a stipulation could be taken to confer upon the Court a jurisdiction which it would not otherwise possess.

As the judgment sued upon was that of a State Court, and as the defendant was residing out of its jurisdiction at

the time the proceedings in the action were carried on and the judgment obtained against him, the fact that he was at that time a citizen of the United States, would not, in my opinion, for the reasons I have stated, give the Court jurisdiction.

I am therefore of opinion that the appeal should be allowed with costs.

NORTH-WEST TERRITORIES.

(REGINA.)

OCTOBER 16TH, 1905.

FULL COURT.

BOCZ v. SPILLER.

Execution — Homestead Exemption — Mortgage — Sale — Lien on Proceeds — Land Titles Act — Incumbrances — Originating Summons.

Appeal by defendants Willoughby & Duncan and McCarthy & Co. from an order of NEWLANDS, J., 1 W. L. R. 366, upon an originating summons for the foreclosure or sale of mortgaged lands.

A. Ross, Regina, and W. M. Martin, Regina, for appellants.

A. L. Gordon, Regina, J. F. L. Embury, Regina, and D. J. Thom, Regina, for respondents.

The judgment of the Court (SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, and HARVEY, JJ.), was delivered by

WETMORE, J.:—This was an application by originating summons under sec. 452 of the Judicature Ordinance for the foreclosure or sale of certain mortgaged premises. Plaintiff is the assignee of a mortgage from defendant Spiller to the Imperial Bank of Canada. Defendants the International Harvester Company are subsequent mortgagees; defendants McCarthy & Co., Smibert, Paul, and Willoughby & Duncan.

are execution creditors of defendant Spiller. The defendants the Smith & Ferguson Company, Limited, and the Union Bank of Canada, are also execution creditors of defendant Spiller. They, however, have not appealed from the decision of the Judge. The other execution creditors filed with the Registrar of Land Titles a certified copy of their executions against lands according to the provisions of the Land Titles Act, 1894, and such certified copies were filed before the registration of the mortgage from defendant Spiller to the Imperial Bank. The originating summons required defendants to attend upon application for an order for the sale or foreclosure of the mortgaged property free from all right and title and equity of redemption on the part of the defendants or any of them or of any person claiming through or under them, and for an order that the mortgage is a first charge upon the land mortgaged, and that the execution creditors whose executions are registered prior to such mortgage be ordered to withdraw their executions, or for an order that the Registrar of Land Titles do cancel the registration or memorandum of all executions upon the certificate of title of the land, and that the Registrar do cancel the existing certificate of title to the lands and issue in lieu thereof a new certificate of title in the name of the plaintiff, or for such further or other order as to the presiding Judge shall seem just.

My brother Newlands, before whom the application was heard, made an order that the defendants McCarthy & Co., Smibert, Paul, Willoughby & Duncan, the Smith & Ferguson Company, Limited, and the Union Bank of Canada, do stand absolutely debarred and foreclosed of and from all right, title, and interest in the said lands or the proceeds thereof; and he directed the sale of the lands at auction, and that the moneys realized by the sale be paid into Court to the credit of the cause, and be applied in payment of the amount due to plaintiff under the mortgage, and costs, and the balance to be applied in payment of the amount due the International Harvesting Company under their mortgage; and the balance then remaining to be paid to the defendant Spiller. This order, in so far as it debarred or foreclosed the rights of the execution creditors, was in effect a declaration that the executions of these parties was not a charge against the land. The defendants Willoughby & Duncan and McCarthy & Co. appealed from the order of Mr. Justice

Newlands. The land in question did not exceed 160 acres, and was the homestead of defendant Spiller. It is contended on behalf of the appellants that Spiller lost his right to exemption on executing a mortgage of the land to the Imperial Bank, and that the executions of the execution creditors so registered in the Land Titles Office then became a lien and charge upon the land. Secondly, failing that contention, that, by virtue of the sale by order of the Court, defendant Spiller lost his right to exemption, and that the proceeds of the sale became subject to satisfy the executions certified copies of which had been so lodged with the Registrar of Land Titles. It was also urged on behalf of appellants that the registration of these certified copies of execution were charges or incumbrances upon the land, and that the execution creditors therefore had a lien on or interest in such land. It was further urged that the Judge had no jurisdiction by originating summons to declare that these registered copies of executions did not form an incumbrance, and they relied upon In re Giles, 43 Ch. D. 391, in support of that contention.

It must be conceded, I think, that the jurisdiction given to proceed by originating summons is statutory, and it cannot be carried further than the clear intention of the enactment would authorize. If the application had been for a declaration that a prior mortgage was invalid, it is quite probable that such declaration could not be obtained by procedure under originating summons. It is also possible that if the certified copies of executions had been registered specifically against the land in question, as was the practice before the passage of the Land Titles Act, such a declaration could not be obtained by procedure under originating summons, but under the Land Titles Act the certified copy of an execution does not form a charge against any specific land; the effect of it is merely to create a charge against lands which are liable to execution, and if these lands were not at the time of the filing these certified copies liable to seizure under execution and never since became so liable, the registration of the certified copies does not form a charge or incumbrance against these lands.

Without questioning the correctness of the decision in In re Giles, I think that the provisions of the Judicature Ordinance with respect to the powers of a Judge under an originating summons issued under the provisions of Rule 452 of the Ordinance are larger than they are in England.

Rule 453 of the Ordinance contains provisions which are not contained in any English Rule affecting the matter. The provision in Rule 453 of the Ordinance that "the Judge may upon such summons pronounce such judgment and make such order as the case may require," is contained in marginal Rule 770 of the English Rules, but the other part of Rule 453, which provides that the Judge may make "orders vesting such property in such person or persons as may be found or declared entitled thereto for such estate or interest as may be requisite," is not to be found in any English Rule. Where a Judge is required to make an order for sale, he can make an order vesting the property in the purchaser upon the execution of the deed by the party directed by the order for sale to execute such deed. Now, how could the Judge declare the interest that would so vest in the purchaser unless he decided whether or not these executions were charged upon the property? It is true that the abstract of title states, and, for all I know, the certificate of ownership may state, that these executions are registered. That, however, is an act of the Registrar, and the fact that he has so stated does not make these executions an incumbrance or charge upon the land. There is no question of fact to be decided as to whether they form an incumbrance or not; it is simply a question of law, and all the Judge has really done is to hold that the registering of these certified copies of executions did not affect the land in question, because, being a homestead not exceeding 160 acres, it was exempt from the executions which these certified copies represented, and that when the moneys were realized from the sale these execution creditors had no interest in it. That was a question that had to be decided in some way or other when the money was paid into Court. Possibly the originating summons went too far in specifying the relief claimed with respect to these executions, but the order is practically correct, assuming, of course, that the filing of these certified copies of executions did not constitute a charge or incumbrance upon the land.

I would call attention to Rule 455, which directs that the "Judge may direct such other persons to be served with the summons as he may think fit." That means other persons than those who were required to be served under the provisions of Rule 454, namely, such persons as under the ordinary practice would be proper defendants to an action for the like relief as that specified by the summons. It

seems to me that that Rule 455 intended among other things to provide for just such cases as the present. I therefore distinguish this case from In re Giles because the Judge did not decide upon the priority of incumbrances; he simply decided that what appeared upon the register, although there by the act of the Registrar, really was not an incumbrance at all as against the land in question.

As to the contention that a mortgagee is not entitled to invoke the provision of the Ordinance respecting exemptions, I cannot agree with that proposition. I think he has that right, because, if he had not, his mortgage might be useless as a security, or its value impeached.

In view of what was held by this Court in Meunier v. Doray, ante, at the last sittings at Calgary, and for the reasons set forth by my brother Newlands, in his judgment, to which I have nothing to add, I am of opinion that he correctly decided that these certified executions were not a charge upon this land. The order, therefore, of Mr. Justice Newlands should be affirmed and this appeal dismissed with costs to be paid by the appellants.

NORTH-WEST TERRITORIES.

(REGINA.)

OCTOBER 16TH. 1905.

FULL COURT.

BOYLE v. GRASSICK.

Principal and Agent—Agent's Commission on Sale of Land —Agreement for Sale Procured by Agent—Terms of Sale not Authorized by Principal.

Appeal by plaintiffs from judgment of NEWLANDS, J., ante 99, dismissing action brought to recover a commission upon the sale of land by plaintiffs as agents for defendant.

C. C. McCaul, K.C., and A. L. Gordon, Regina, for plaintiffs.

J. Balfour, Regina, for defendant.

The judgment of the Court (SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, and HARVEY, JJ.), was delivered by

WETMORE, J.:—The facts of the case are practically undisputed. The plaintiffs were real estate brokers residing in Regina. The defendant employed them to sell lots 18, 19, 20, block 284 in that city. The price of the lots was to be $9,500, of which $5,000 was to be paid in cash, the balance in 3 equal annual instalments with interest at 7 per cent.

The plaintiffs, in alleged pursuance of their employment, obtained purchasers for this property, namely, Messrs. Smith & Fodey, and they executed and delivered to them the following memorandum or agreement:

"REGINA, Jan. 26, 1905.

"Received from Smith & Fodey, of Regina, N.W.T., the sum of $500 as earnest money on the purchase of lots 18, 19, and 20, of block 284, in the city of Regina, N.W.T., the whole purchase price being $9,500.

"$5,000, of which this earnest money shall form a part, to be paid in 10 days from the date hereof.

"$4,500 to be paid in 3 equal annual payments with interest thereon at the rate of 7 per cent. per annum.

"Sufficient transfer and notes secured by mortgage to be made, executed, and delivered by the proper parties at the time the first payment of $5,000 shall be completed. Provided that if the said Smith & Fodey fail to complete the first cash payment of $5,000, the earnest money may be declared forfeited.

"30 days after the deal is closed allowed to vacate property.

"John H. Boyle & Co.,
"Agents for James Grassick."

This agreement was presented to defendant, who was fully aware of its contents, but he refused to carry the sale out because Smith & Fodey were in the same business as himself and competing with him. He stated on his examination for discovery, which was put in evidence, that his only reason for not completing this sale was the fact that these men were so in business competing with him, and it is important to bear this fact in mind in view of the judgment which I am now giving.

The trial Judge gave judgment for defendant because the agreement or memorandum which plaintiffs gave to the

proposed purchasers was not authorized by their agreement with defendant in the following particulars: (1) Because they did not agree for the payment of $5,000 in cash down, but postponed $4,500, part of that payment, for 10 days after the date of memorandum. (2) Because the memorandum provided for security for the balance of the purchase money being given by mortgage. And he held this under the authority of McIntyre v. Hood, 9 S. C. R. 556, and Gilmour v. Simon, 1 W. L. R. 417. Those cases, to my mind, do not govern this case. The question that was raised there was, whether the plaintiff was entitled to specific performance of the contract for the sale of land. The question that is raised here is, whether the plaintiffs, being agents, are entitled to be recompensed for their services in connection with obtaining a purchaser for the sale of lands. I think the considerations affecting the respective questions are entirely different.

At the hearing of this appeal counsel for plaintiffs applied to amend the statement of claim by adding an alternative claim as follows: "Alternatively the plaintiffs' claim is for the sum of $500 for services rendered by the plaintiffs as real estate brokers to the defendant at his request, whereby the plaintiffs procured a purchaser qualified and willing to buy the land of the defendant mentioned in the preceding paragraph, substantially upon the terms which the defendant intimated to the plaintiffs as those upon which the defendant was willing to sell. The defendant agreed to pay the plaintiffs the sum of $500 for such services. The services so rendered by the plaintiffs to the defendant were reasonably worth the sum of $500."

There is no doubt that this Court has, by virtue of Rule 507 of the Judicature Ordinance, power to make the amendment asked for, and by virtue of Rule 178 it ought to do so if it is necessary for the purpose of determining the real questions in controversy between the parties. Now, the real question in controversy between the parties here is, as I have stated, whether or not the plaintiffs are entitled to recover compensation for their services in connection with obtaining a purchaser for these lots. In my opinion, therefore, the amendment ought to be allowed, because it is questionable whether the plaintiffs were entitled to recover under the statement of claim as originally framed. In fact it was conceded that they were not entitled to recover under it, and that if entitled to recover at all it must be upon an alternative paragraph as set forth in the amendment.

The case which, in my opinion, governs this appeal and which is binding upon this Court, is Mackenzie v. Champion, 12 S. C. R. 649. In that case the appellants, Mackenzie & Lee, were real estate agents in Winnipeg, and received oral instructions from the respondents to sell certain lands in the parish of Kildonan. The appellants found a purchaser for the land, and $5,000 was paid on account of the purchase money. But prior to the expiration of the time within which the balance of the purchase money was to be paid the purchaser discovered that the patent for 75 or 80 acres of the land proposed to be sold had not been issued, and the respondents were without title to such a portion, and they therefore refused to complete the purchase. The plaintiffs brought their action to recover commission upon the whole amount of the agreed purchase price, and the jury, under the direction of the trial Judge, awarded them such commission at 2½ per cent. on such price. The Court of Queen's Bench for Manitoba reduced the verdict to $125, being commission on the $5,000; or, if the plaintiffs refused to accept it, ordered a new trial. The plaintiffs appealed to the Supreme Court of Canada, and the Court confirmed the judgment, on the ground that the trial Judge ought to have submitted certain questions to the jury which he did not submit. The judgment of the majority of the Court was delivered by Ritchie, C.J., and at p. 655 of the report he lays down the following: "I think the jury should have been asked to find what the contract was between the plaintiffs and the defendant; that is, what plaintiffs were employed to do, and then what they did do; whether plaintiffs were to make a valid and binding sale of the property? If so, did plaintiffs fulfil the contract and make such a sale; if they did they would be entitled to their commission, otherwise not. If a sale was made, was the same not completed by reason of want of title in or default of defendants? If such was the case, the plaintiffs would be entitled to commission. Or, in other words, were plaintiffs merely to find a purchaser willing to purchase; if so, did they fulfil their contract, and was the purchaser ready and willing to complete his purchase, and did the sale fall through because defendant could not or would not complete the sale by reason of want of title or otherwise, and so the non-completion of the sale was the fault of the principal, and not that of the agent? If so, plaintiffs would be entitled to their commission, because they substantially performed what they under-

took to do." I may add by way of explanation of that case that the real question in controversy there was whether the brokers were employed to sell the property or merely to find a purchaser. That question was raised by the defendants' pleadings. They set up that the agreement with the brokers was that they were to sell the land and make and execute the contract of sale, and not having made and executed a proper contract of sale the defendants had nothing to enable them to compel the purchaser to carry out his contract.

Now, I think in this case it is important to decide whether the plaintiffs were employed to sell the land in question or merely to find a purchaser. Evidently the plaintiffs were under the impression that they had authority to sell: the defendant, however, was under a different impression, that they had no power to sell, but, on the contrary, before they made a sale they had to submit the name of the proposed purchaser to him for his approval. The question is not what the impressions of these parties were according to the testimony they have given, but really what was intended when the plaintiffs were authorized to sell. The plaintiff Boyle testified as follows: "We were to engage to sell that property which I have mentioned, and that we were to ask $9,500 for it, and that we were to receive $500 for selling it, as we call it, or finding a purchaser."

Taking the whole of the evidence, I am of opinion that the plaintiffs were not authorized to sell the property; that is, they were not to make a contract and execute an agreement of sale; all they were employed to do was to find a purchaser of the land on the terms that were stated. The term "sell" is the term that would be ordinarily used when a person lists property with a broker to find a purchaser, and unless there is something to indicate that there was an intention to give authority to sell it would be inferred that the intention merely was to authorize the broker to find a purchaser, and that, I think, is all that was intended in this case.

Having reached that conclusion, the question is, under the judgment of Ritchie, C.J., did the plaintiffs fulfil their contract, and was the purchaser ready and willing to complete his purchase, and did the sale fall through because the defendant would not complete the sale? I am of opinion that those questions must be answered in the affirmative. It may be that the terms set forth in the memorandum which the plaintiffs signed varied from the terms proposed by the

defendant when they were employed, but, so far as the terms arranged with the proposed purchasers were concerned, the defendant was satisfied with them. The memorandum in question was handed to him; he knew what the terms of sale were, and he had no objection to offer to them; the only objection was to the proposed purchaser; or, in other words, the plaintiffs found a purchaser of these lots upon terms which were acceptable to the defendant. That being so, under the authority of the cases I have just referred to, they are entitled to recover for their services. Possibly they are not entitled to recover a sum as commission, but they are entitled to recover one by way of compensation. But whether they are entitled to recover by way of commission or by way of compensation is immaterial, in my judgment, because I think that the amount to be recovered either way is $500.

In my judgment the proposed amendment should be allowed, the judgment of the trial Judge reversed, and judgment entered for plaintiffs for $500 and costs; the defendant to pay the costs of this appeal.

YUKON TERRITORY.

CRAIG, J. SEPTEMBER 22ND, 1905.

TRIAL.

CLAZY v. MYERS.

Mines and Minerals — Placer Mining — Lay Agreement — Lease — Forfeiture — Breach of Conditions — Failure to Carry on Mining Operations — Waiver — Acceptance of Percentage of Output.

Action for forfeiture of a mining lease and other relief.

F. L. Gwillim, for plaintiff.

George Black, for defendants.

CRAIG, J.:—Plaintiff is the owner of a mining claim known as the upper half of 76 below discovery on Bonanza Creek, Dawson District, and on 19th January, 1905, by an instrument under seal, leased to defendants the said claim, calling it an agreement to lease as a lay, and under the terms of that instrument the defendants were to commence active mining operations within 10 days from the date of the lease or lay, and to continue the operations during the term continuously; the claim to be worked under the terms and conditions set forth in the instrument. Several conditions were embodied in the document—prohibition against panning, except sufficient to test the ground; faithful operation in a minerlike and workmanlike manner; payment of labour, and obtaining from all labourers on the claim waivers or releases of their rights under any mechanics' or miners' liens' Ordinance in force in the Territory; a special proviso for forfeiture on breach of this last condition; and a general covenant for the performance of all conditions. The defendants (the lessees) were to work the ground and pay to plaintiff (the lessor) 25 per cent. of the output. The claim is placer ground, and was to be worked by the usual methods of placer miners in the Yukon Territory.

The evidence shews that defendants did nothing for about two months or over on the ground either in preparation for work or in actual operations. They then sank some shafts, a couple of which they abandoned, not finding sufficient pay, one being sunk only some 9 feet, and the other to bed-rock. One shaft only was operated to any extent.

The main complaint on the part of plaintiff is, that the ground was not operated continuously in a minerlike manner, that is, that the work performed upon the claim was farcical as a mining operation. A great many witnesses were called on behalf of plaintiff, many of them expert miners. Storrey, the agent for plaintiff, swore that he went on to the ground and received three clean-ups, that is, the 25 per cent. coming to the owner. These were, on 6th May 10 ounces, on 19th May 3½ ounces, and on 29th May 6¾ ounces. He swears that the amount of work done was infinitesimal; that defendants had upon the ground only a little boiler, one and a half or two horse power, which a man could pick up and carry away himself. He gives evidence as to the quantity of ground which two men working with ordinary ap-

pliances sufficient for two men, one underneath and one on top at the windlass, should take out, and shews that the quantity of ground that these men took out was far and away below the capacity of two men working as they should work. Mr. Clazy, the owner, gives evidence to the like effect. The defendant Clark did not enter any appearance nor defend the action, and was called as a witness on behalf of the plaintiff, and he swore that defendants had constant differences of opinion as to the manner in which the claim should be worked, and did not pretend that any operations which could be called mining operations, were carried on by defendants. Mr Bartholdi, a miner carrying on large operations upon adjoining claims, swore that the manner of working of these defendants was, in his opinion, almost absurd, and could not be at all called mining operations. Mr. McLaren, a large operator, gave evidence as to what men should do under like conditions and under the conditions existing in this ground, and also shewed that the work done was almost farcical. Mr. Davies, a mining man of large experience, gave evidence to the same effect, also Mr. Smith, another miner, and Mr. Swanson. Even the witnesses for the defence would not say that the work would at all be satisfactory from the standpoint of an owner, or even from the standpoint of the laymen or workmen themselves. It was clearly shewn that the wages they were making were far below what the ordinary wages of labouring men in the Territories were, being only about one-third. Altogether from the evidence both of plaintiff and defendants, I draw a conclusion which is irresistible, that these men were simply fooling away their time with a miserable little boiler which was hardly sufficient for prospecting purposes; that at another time they got a larger boiler, which was carried away at the will of the lessor of that boiler, the boiler only being leased upon the terms of defendants paying so much per thawing or so much per week.

Another ground of complaint was that defendants did not secure a sufficient supply of wood to operate the claim in the summer; that wood should be got in this territory in the winter, when it can be obtained more cheaply and easily; also that they did not timber the shaft, as miners should. While it is not shewn that defendants were ever out of wood when they wished to operate, yet it is shewn that they never had more than 3 cords of wood on the claim at one time,

and that quantity was very often reduced to half a cord. While I do not think that a forfeiture would be worked on account of the lack of the wood, nor perhaps even for the non-timbering of the shaft, yet I think that both these circumstances shew that defendants were not operating as miners should operate, that they were pottering along entirely indifferent to the interests of the owner or even to their own interests. They had 3 years to work out the claim, and what they have done even up to the present time and certainly up to the time of the issue of the writ, would not be called even good prospecting; very much less could it be called mining operations.

It is contended on behalf of defendants that the acceptance of the gold dust by the agent of the owner was a waiver of the forfeiture up to at least 29th May, when he accepted the last clean-up. I do not think the acceptance of gold dust under the conditions existing here operates as a waiver of forfeiture, in the sense in which acceptance of rent after it becomes overdue is a waiver of forfeiture for non-payment. It is an entirely different state of affairs. What a lay agreement in this Territory is has not yet been definitely settled by any judgment of this Court. Whether it may be called a lease or a working partnership or what, I do not need now to determine; but one must consider this, that the delivery of the product of the mine cannot be considered as a payment of rent. The agreement is a working agreement by which the owner allows the layman to go upon his placer ground and extract gold, taking as his share a certain percentage of the mineral extracted. That, as soon as it is recovered from the ground, is his property by the terms of the lease and by the custom of the country; in fact, it is his property all the time, the laymen only exposing or recovering it. The owner or his agent attends on the ground, is present at the operation of washing up the gold, and takes, as a matter of right, directly from the pan or sluice boxes, the gold which is his share under the agreement. That he at once takes possession of as his own property. It does not pass into the possession of the lessee or layman, and if it does it is only held by the lessee or layman as the property of the owner, who is entitled to that absolutely. The very nature of the operations would indicate that any other arrangement would be disastrous to an owner. The operations, as they

proceed, exhaust the entire value of the ground. There is no other value in the ground but the placer mineral contained in it, and the work is to extract that, allowing to the workman so much for his labour proportionate to the value or richness of the deposit. Even if I were to hold that these acceptances of gold dust constituted a waiver of forfeiture up to 29th May, yet defendants after that date continued to work the claim in the same shiftless manner as before. In fact they did less work up to the issue of the writ from 29th May than before. During the month of June, when water was plentiful, as is sworn, they were almost idle. They tried to explain delay in the operations and the loss of time, but could not give any satisfactory account of it at all. It is contended that these men should have ample time to secure a plant and begin operations, but that can be no defence whatever. Men who undertake lays and enter into formal contracts to go on and commence mining operations upon a claim, should either have the machinery and the means to begin or should be in a position to get them. It is absurd to contend that an owner must stand by and allow laymen to waste time, which is valuable in this country, to hunt around and experiment and endeavour to get necessary tools and machinery. It was not the intention that these men should have a year or any other time to do a little prospecting on the claim; the intention was that they should begin mining operations after a reasonable time exhausted in ascertaining the best places to sink their shafts. And, therefore, if it could be held at all (and I think it could not) that the acceptance of the gold dust up to 29th May was a waiver, certainly nothing was done after that time to create a waiver of forfeiture.

The non-obtaining of waivers or releases of lien from the workmen on the claim would be sufficient under the contract to forfeit the lay agreement, but if the work had gone on in a proper manner I do not think that the plaintiff suffered any damage from the non-obtainment of these waivers, because before the issue of the writ all the parties entitled to lien had been satisfied.

Upon all the grounds raised I think plaintiff is entitled to succeed. Plaintiff at the trial asked for an amendment, claiming the whole of the gold dust extracted from the claim after the notice of forfeiture was given and action begun. I do not think he is entitled to it all. I do not think he is en-

titled to any more than he would recover if defendants had been mere trespassers. They were overholding tenants, perhaps, believing or asserting that their lay agreement had not been forfeited. They kept on working in a certain manner and extracted a certain quantity of gold dust. No greater penalty should be imposed upon them than if they were trespassers under a mistake of title, and the Courts here have repeatedly held that under such circumstances the trespasser is entitled to the cost of extracting the material. The parties themselves have fixed accurately enough for me what that cost is. Of course in allowing the defendants 75 per cent. I am allowing them what they themselves agreed upon, which would probably include some profit, but it is so infinitesimal in this case that it is hardly worth noticing, and the judgment will be as prayed for and judgment also for 25 per cent. of the output of the claim since the payment over of the last clean-up on 29th May, with the costs of the action.

YUKON TERRITORY

MACAULAY, J. SEPTEMBER 28TH, 1905.

COURT.

YUKON HARDWARE CO. v. McLENNAN.

Costs — Extra-judicial Seizure under Chattel Mortgage—Statutory Limitation of Costs—Contract to Avoid—Penalty—Recovery by Action of Excessive Costs Charged and Deducted.

This was a stated case presented to the Court for its opinion under the following set of circumstances:

(1) The defendants, as the costs of an extra-judicial seizure and sale under a chattel mortgage made by plaintiffs, to defendants, deducted from the amount realized from such sale the sum of $936.89; such mortgage being given and seizure and sale made in the Yukon Territory.

(2) The amount which the defendants would be entitled to deduct as the costs of such extra-judicial seizure and sale, under the provisions of ch. 31 of the Revised Ordinances of the Yukon Territory and schedule thereto, would be $390.25.

The questions for the opinion of the Court were:

First, whether defendants were entitled to any costs or expenses in connection with the seizure and sale under the mortgage other than as provided by ch. 31 and schedule thereto.

Second, whether plaintiffs were entitled to recover against defendants the penalty provided under sec. 3 of ch. 31.

Third, whether, in the alternative, plaintiffs were entitled to recover against defendants all costs in connection with the seizure and sale under the mortgage charged by the defendants in excess of the costs allowed by ch. 31, as moneys had and received by defendants to the use of plaintiffs.

MACAULAY, J.:—I have carefully examined ch. 31 of the Consolidated Ordinances of the Yukon Territory, being "An Ordinance respecting Distress for Rent and Extra-judicial Seizure," and secs. 2 and 3 thereof. Section 2 is very explicit in its terms and as to the provision it makes for costs for a seizure made under the authority of a chattel mortgage, bill of sale, or any other extra-judicial process. It provides that "no person making such seizure, nor any person employed in any manner in making such seizure or doing any act in the course of such seizure or for carrying the same into effect, shall have, take, or receive out of the proceeds of the goods and chattels seized and sold, from the person against whom the seizure may be directed, or from any other person, any other or more costs and charges for and in respect of such seizure or any matter or thing done therein or thereunder than such as are fixed in the schedule hereto," etc.; the schedule then provides for the costs that may be incurred.

Nothing, in my opinion, could be more explicit than the provisions of this section. I have examined an Act respecting Distress and Extra-judicial Seizure in force in the Province of Manitoba, being ch. 49 of the Revised Statutes of 1902 of that province. This Act contains similar provisions to the one in question. Our Act is exactly the same in terms as the

provisions contained in the Ordinances of the North-West Territories.

I have looked carefully through all the reports of the North-West Territories, and also for the province of Manitoba, but have been unable to find that this question was ever raised before the Courts of the North-West Territories, or of the Courts of the province of Manitoba. There is a similar Act contained in the Revised Statutes of the Province of Ontario, ch. 75 of R. S. O. 1897. This Act is not so strong in some of its terms as the other Acts mentioned, and sec. 12 of the Ontario Act makes it clear that the penalty under that Act is intended to be applied to the bailiff or person actually making the distress or seizure. However, it seems clear under that Act that no other costs excepting those provided for in the schedules thereto were intended to be charged, and if they were charged that other remedies might be taken, besides the one providing the penalty in the Act, for the recovery of any moneys that were improperly charged.

I have also carefully examined the reports of the cases of the province of Ontario, and I am unable to find any case similar to the one before me having been decided by the Courts there. I am, therefore, compelled to come to my conclusions on the statute before me.

As the case is stated before me, I am not compelled to draw any distinction between the defendants and their bailiff, because it is admitted that the defendants made the charges that were made.

Although not mentioned in the stated case before me, the mortgage under which the sale in question was made was handed to me, and contains a provision that "in case default is made the mortgagee may sell the property mentioned in the mortgage at public auction or private sale, on the premises described in the mortgage or elsewhere, as may seem meet, and from and out of the proceeds of such sale in the first place to pay and reimburse itself all sums of money that may be due by virtue of these presents, and all costs and expenses, including the costs, if any, of the solicitors for the mortgagee, as may be incurred by the mortgagee in consequence of the default, neglect, or failure of the mortgagor in payment of the moneys and interest mentioned in the mortgage," etc.

There is nothing before me, however, to shew that the moneys, or any part of the moneys, retained by the defendants were charges of their solicitors, and, notwithstanding the provisions of the mortgage, I am of the opinion that the mortgagor could not enter into a contract to avoid the provisions of said ch. 31, because it is a well settled principle of law that a contract to do something which is contrary to law and forbidden by statute, and for which a penalty is imposed, is absolutely void.

I am of opinion that, under the provisions of sec. 2 of ch. 31 of the Revised Ordinances of the Yukon Territory, the defendant company are only entitled to charge the plaintiffs such costs as are provided for under that Act, and which are admitted to be the sum of $390.25.

As to the question whether or not the plaintiffs are entitled to recover against defendants the penalty provided under sec. 3 of ch. 31, I am of the opinion that under sec. 3 it is optional with the Judge whether or not such penalty should be imposed, and, under the circumstances, I will not impose the penalty provided under the said section.

As to question 3, I am of opinion, under the circumstances, that plaintiffs are entitled to recover against defendants all costs in connection with the seizure and sale under the said mortgage charged by defendants in excess of the costs allowed by ch. 31, as moneys had and received by defendants to the use of plaintiffs.

I am, therefore, of opinion that plaintiffs should be entitled to judgment for $546.64, being the difference between the amount retained by them and the amount which it is admitted they are entitled to retain according to the schedule of ch. 31, and their costs of this action.

YUKON TERRITORY.

CRAIG, J. SEPTEMBER 28TH, 1905.

YUKON TRUST CO. v. MURPHY.

Landlord and Tenant — Lease — Renewal — Subsequent Attempt to Cancel—Sub-tenant—Payment of Rent Direct to Landlord—Surrender—Release—Estoppel.

Action for $150, being the balance of rent claimed by plaintiffs against defendant for the month of August, 1905, for the premises mentioned in the statement of claim, on First avenue in the city of Dawson.

MACAULAY, J.:—The defendant, under an indenture of lease dated 10th August, 1904, rented the premises from plaintiffs for one year. The lease contained a proviso, among others, that "the lessor does further agree with the lessee to renew the said lease for one year from the expiration of this present lease, provided the said lessee signifies his desire to remain 4 months in advance of the expiration of this present lease, on the terms and conditions mentioned in the lease."

On 30th March, 1905, defendant wrote a letter to J. Hess, agent for plaintiffs, in the following terms:

"Dear Sir,—I beg to advise you it is my intention to renew my lease at the expiration of the present term, for cigar store more minutely known as store No. 2; such notification being in accordance with our present lease. Trusting to hear from you at your earliest convenience, I remain, yours respectfully, L. A. Murphy."

On 1st April, 1905, J. Hess, as agent for plaintiffs, wrote a letter to defendant in the following terms: "Dear Sir,—I herewith acknowledge receipt of your letter of 30th March advising me of your intention to renew your lease of store No. 2, Aurora building, at the expiration of the present term in accordance with the terms and stipulations of the present lease. Yours very truly, The Yukon Trust Company, Limited, J. Hess, Agent."

Nothing further occurred between the parties, according to the evidence, until 25th July last, when defendant wrote the following letter to J. Hess, agent for plaintiffs: "Dear Sir,—On 30th day of March last I wrote you declaring my intention of renewing my lease for cigar store in Aurora block, known as store No. 2. Since this time, however, I have engaged in other business, and the present tenant, D. Rose, advises me he is seriously contemplating retiring from business this fall. Therefore I must cancel the renewal of these premises in question. Hoping you may be successful in securing another lessee, I remain, Very truly yours, L. A. Murphy." To which letter Hess, as agent for the company, replied on 29th July: "Dear Sir,—In reply to your letter of 25th instant, I beg to state that you have re-leased the cigar store No. 2 in the Aurora Block for one year from August 1st, 1905, to July 31st, 1906, and that you are responsible for the entire rent for the above stated period. Yours very truly, The Yukon Trust Company, Limited, J. Hess, Agent."

This is all the correspondence that passed between the parties relative to the lease of the property.

It appears from the evidence that in or about the month of October, 1904, Murphy, the lessee, sublet these premises, or a portion of them, to one D. Rose. The plaintiff did not object to this action, and for a portion of the remaining period of the original term at least Rose paid the rent direct to Hess as agent for plaintiffs. Since 1st August of the present year Rose has made certain payments to plaintiffs, viz., $100 for the month of August and $100 for the month of September of the present year, and received receipts from Hess for the same on account of the rent due by Murphy.

Hess's evidence shews that he never treated Rose as the tenant, and neither the evidence of Rose or Murphy contradicts Hess in this statement. Hess did agree with Rose, however, that he would not distrain for the balance of the rent due when he received the $100 payment.

It is contended by defendant that the action of plaintiffs in accepting a portion of this rent from Rose amounted to a surrender of the lease by operation of law, and that by so acting he accepted Rose as his tenant, and defendant was released, and plaintiffs estopped from denying that Rose was the tenant.

I am unable to take this view of the case, and am of the opinion that defendant, by his letter of 30th March, took advantage of his right of renewal for one year from 1st August, 1905, which right was acceded to by plaintiffs in their letter to him of 1st April, and that he could not abandon that position by his letter of 25th July. He already had exercised his option to retain the premises for another year on the terms and stipulations set forth in the lease of 10th August, 1904, and he is bound by that option. There is nothing in the evidence, in my opinion, which shews that plaintiffs in any way accepted Rose as their tenant in place of defendant, or in any way released defendant from the obligations into which he had entered. It was not necessary that there should be any further or other agreement in order to enable defendant to hold the premises for another year than his notice to plaintiffs of 30th March. Plaintiffs were bound to consider that a renewal of the lease, and defendant could have held them to their agreement, and held the premises for another year from 1st August, 1905.

As before stated, in my opinion, plaintiffs acted in no manner towards the defendant, or with Rose, that would indicate that they intended to release him.

Plaintiffs are entitled to judgment for $150 and costs of the action.

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YUKON TERRITORY.

CRAIG, J. SEPTEMBER 27TH, 1905.

COURT.

MEACHAM v. NUGENT.

Attachment of Debts—Wages—Exemption—Rule 395—Construction of.

Stated case upon facts shewn upon a garnishing application.

George Black, for plaintiff.

J. G. Hay, for defendant.

CRAIG, J.—This matter is laid before me as a stated case for the interpretation of Rule 395 of the Judicature Ordinance affecting exemptions from garnishment. The Rule is as follows: "Unless the debt sued for or in respect of which the judgment was recovered has been contracted for board and lodging, the wages or salary of a mechanic, workman, labourer, clerk, or employee shall not be liable to seizure or attachment unless such wages or salary exceeds the rate of $75 per month, and then only to the extent of the excess." Sub-section (2): "All payments which have been made on account of such wages or salary during any period in which the same are being earned shall be deducted from the above exemption."

The defendant worked during the month of June and part of the month of July for the garnishee, and the question arises as to the wages earned for the part of the month of July.

He was earning a great deal more, more than twice $75 per month, and had earned for the month of July, up to the time of the service of the garnishee summons, $51.75. Out of that he had been paid $15.75, leaving $36 in the hands of the garnishee for that month. The defendant claims the entire amount earned for July as exempt from garnishment, maintaining that there must be $75 earned and due or accruing due to the defendant from the garnishee before the garnishment will take effect; that is, that the total sum or debt up to $75 is exempt from garnishment, no matter at what rate of wages or for how long the defendant may be working. It is entirely a question of the interpretation of the language of the section. No authority has been cited to me, and I can find none. The Ontario enactment provides for a fixed sum or debt being due before the garnishment will attach in like cases. Here the section is entirely different. The only way we can arrive at a conclusion is, I think, by transposing the words of the section to get their exact meaning. If the Rule is put in this way, which I think is the correct expression of its meaning, we shall see what its meaning really is: "Garnishment shall not take effect unless the defendant is working for wages or salary at a higher rate than $75 per month, and the garnishment will only take effect upon the wages earned at that higher rate or upon the excess earned over $75 per month." The section aims at what? At the excess. And the excess is not over a fixed sum, but an excess over a rate. The words, it strikes me, are clear—"wages shall not be liable to seizure unless the rate exceeds $75 per month," and on the excess rate and on the amount earned at that excess rate and over that rate. The contention that no matter what the rate may be, a man must have $75 coming to him before there can be a garnishment, I think cannot be upheld upon the words of the section, and by those words I am bound. It is an extremely inconvenient section to apply, but I see no alternative, and I think sub-sec. (2) carries out this view of the section. When one considers what I conceive to be the object of the Rule, I think my interpretation of it will appear to be a correct one. The object of the Rule, as I conceive it, is to provide sustenance and support for the debtor, that a reasonable amount be left to him to maintain him, not by the month or the year or anything else, but by the day. It is true the word "day" is not used, but "month" is, and it must mean the man's daily support or support sufficient

to keep him for a month from day to day. If the other interpretation of the Rule is taken, a man by changing his employment when he has earned $75 could defeat the garnishing process forever, and he could in this way be earning wages 4 or 5 times exceeding the rate of $75 per month, and by simply changing his employer still not be liable to garnishment, which I think is not the intention of the Act.

I therefore am of opinion that when a man is working for wages in excess of $75 per month, then as he earns the wages and when those wages become a debt due or accruing due from his employer to himself, the excess is garnishable, notwithstanding that he has not earned and has not a debt then owing to him of $75.

There will be no costs.

MANITOBA.

MATHERS, J. OCTOBER 30TH, 1905.

CHAMBERS.

CHRISTIE v. McKAY.

Mechanics' Lien — Action to Enforce — Parties — Former Owner.

The statement of claim was filed by plaintiffs against McKay & Co., contractors, R. George, and T. Collins. It alleged that Collins was up to 22nd April, 1905, the owner of certain lands in Winnipeg; that McKay & Co. employed plaintiffs to do work on a dwelling-house on the land; that McKay & Co. were employed by Collins to do work on the house; that after McKay & Co. agreed with Collins to do the work they requested plaintiffs to do part of said work; that materials were furnished by plaintiffs in accordance with the terms of the contract between Collins and McKay & Co.; and there was due a large sum by Collins to McKay & Co. under the contract; and that plaintiffs were entitled to a lien on the lands in question; that on April 22nd Collins sold and transferred the lands to R. George, who was then the registered owner. Plaintiffs asked for an order for payment, and in default a sale of the lands.

Defendant Collins moved for an order dismissing the action as against him, or for an order striking out his name as a party defendant, on the ground that the statement of claim disclosed no cause of action against him and that he had been improperly joined.

Campbell, Pitblado, Hoskin, & Grundy, for defendant Collins.

J. R. Haney, for plaintiffs.

MATHERS, J.:—I do not think that the defendant Collins is either a necessary or a proper party to this action. Long before the lien was filed he had sold and conveyed all his interest in the land to the defendant George. The plaintiffs' contract was made with the defendants McKay & Co. No relief is asked and none could be obtained by the plaintiffs against Collins. It is alleged in the statement of claim that Collins employed McKay to do the work and that he owes McKay more than the amount of the plaintiffs' claim. It was argued that because it is necessary to prove that there is something due from Collins to McKay, Collins was therefore a proper party to the suit.

There is no doubt that a sub-contractor's lien depends upon there being something due by the owner to the contractor.

It is not necessary, however, to prove this fact at the trial. This is a matter usually left to be ascertained in the Master's office: McLennan v. Winnipeg, 3 Man. L. R. 474. If necessary to add any parties there, he could do so under Rule 40.

Of course the trial Judge may dispose of the matter without a reference to the Master, but I cannot see that it is necessary to retain Collins as a party in order to enable him to do so. The fact of Collins's indebtedness to McKay may be proved as any other fact in the action. The plaintiffs have no claim against Collins and seek no relief against him. Neither is it necessary to retain Collins as a party in order that the plaintiffs may obtain the relief to which they are entitled as against the other defendants.

There will be an order that the name of the defendant Collins, as a party defendant, be struck out with costs.

MANITOBA.

MATHERS, J. OCTOBER 31ST, 1905.

CHAMBERS.

LEE v. GALLAGHER.

Pleading — Statement of Claim — Amendment — Parties — Joinder of Causes of Action — Specific Performance — Recovery of Land.

The action was for specific performance of a contract. Defendants Pepler and Macdonell owned property which they sold to defendant Gallagher; he sold to plaintiffs O'Shaughnessy and Armstrong, and they sold to plaintiff Lee.

Lee tendered to Pepler and Macdonell the balance due them, but before he received a transfer he heard that one Langley had a house on a portion of the property and that he claimed a right to the land on which it stood by prescription.

Plaintiffs moved by way of appeal from an order of the referee, for an order to amend the statement of claim by adding three paragraphs, and for leave to join with a claim for the recovery of land as against Langley, a claim for specific performance, or damages by way of compensation for breach of contract, as against Pepler and Macdonell.

T. M. Daly, K.C., for plaintiff.

Hough, Campbell, & Ferguson, for defendant Gallagher.

Aikins, Robson, & Loftus, for defendant Pepler.

Archibald, Machray, & Sharpe, for defendant Macdonell.

McKerchar & Forrester, for defendant Langley.

MATHERS, J.:—With all deference to the learned Referee, I think I must allow the appeal.

It is the policy of the King's Bench Act that all questions between the parties should, as far as possible, be determined in the one action, "and all multiplicity of legal proceedings concerning any of such matters, avoided:" K. B. Act, sec. 38 (k). Since the Judicature Act the practice of

the Court has always been to allow all amendments, so that as far as possible all questions between the parties shall be decided so as to prevent multiplicity of actions: Krutz v. Spence, 36 Ch. D. 770. The test as to whether an amendment ought to be allowed is whether or not the party can amend without placing the other party in such a position that he cannot be recouped by an allowance for costs or otherwise: Stewart v. Metropolitan Tramway Co., 16 Q. B. D. 180, 558; and see cases collected in Annual Pr. 1905, at p. 350.

It is argued that because the amendment sought to be made sets up a new cause of action it should be refused, but that is not of itself a ground for refusing the motion. Such an amendment was allowed in Budding v. Murdock, 1 Ch. D. 42, and in Hubbuck v. Helms, 56 L. J. Ch. 539.

It was further contended that leave to join another cause of action with an action for the recovery of land can only be granted before the commencement of the action, and the dicta of several of the Judges would seem to support that contention. I am satisfied, however, by an examination of the cases that none of them is an authority against the allowance of the amendment in this case. The first case in which the matter was dealt with, so far as I have been able to find, is Pilcher v. Hinds, 11 Ch. D. 905. There the writ was issued without leave and served upon the defendant. The plaintiff then took out a summons in Chambers "to continue the action in its present form." Fry, J., dismissed the application, and an appeal to the Court of Appeal was also dismissed. In Musgrove v. Stevens, W. N. 1881, p. 163, an application was made to amend after the commencement of the action, and the question again came before the Court of Appeal. In delivering the judgment of the Court of Appeal, in which Baggallay and Lush, L.JJ., concurred, Jessel, M.R., said "that the words of the Rule were certainly wide enough, but the plaintiff must make a very special case for an amendment of the writ; in the present case no special case had been made, and there was no reason why the plaintiff should not commence a separate action;" and dismissed the appeal. McIlhargey v. McGinnis, 9 P. R. 157, was originally an action for the recovery of land. By amendment, apparently under a general Order, the plaintiff added other causes of action; an application to

strike out the amendment was allowed by Wilson, C.J., following Pilcher v. Hinds.

In Clark v. Coray, 31 Ch. D. 68, the defendant applied to amend his counterclaim and join therewith a claim for the recovery of land. Bacon, V.-C., in refusing the application, said: "In my opinion the practice upon this subject is clear; the Rule is clear that unless the Court think it reasonable no such leave as is here asked for, ought to be given." There is no question, however, but that he would have granted the leave had he thought it reasonable to do so, for in Rushbrooke v. Farley, 52 L. T. 572, decided by himself a few months previously, he granted leave to amend by adding an alternative money claim to an action for the recovery of land. Leave to amend after the issue of the writ was also granted in Hunt v. Tensham, 28 Sol. J. 253, and in White v. Ramsay, 12 P. R. 526.

The English Order 18, R. 2, and the old Ontario Rule now repealed are practicaly identical with our Rule 258.

The rule to be deduced from the decided cases would appear to be that where the plaintiff, without leave, unites with an action for the recovery of land, a cause of action forbidden by Rule 258, the Court will not help him; but if, having properly commenced his action, a plaintiff subsequently applies to amend by adding another cause, the Court will, if it considers the application reasonable, grant the amendment.

I cannot see that the defendants will be prejudiced by the allowance of this amendment. On the other hand, I think it is in the interest of all parties that all matters in difference between them in relation to the transaction set out in the statement of claim should be disposed of in the one action.

The appeal is allowed and an order made permitting the amendment.

The costs of this appeal will be to the plaintiffs in any event. The costs of the application to the Referee and all costs of and occasioned by the amendment will be to the defendants in any event.

MANITOBA.

MATHERS, J. NOVEMBER 1ST, 1905.

TRIAL.

WEIDMAN v. PELAKISE.

Specific Performance — Contract for Sale of Land—Execution of, by Foreigner — Understanding of Agreement — Onus — Terms of Sale — Plantiffs not Prepared to Carry out.

Action for specific performance of an alleged agreement to sell a lot in the city of Winnipeg.

H. W. H. Knott and T. J. Murray, for plaintiffs.

D. W. McKerchar, for defendant.

MATHERS, J.:—The defendant is a Galician, who does not understand the English language. The plaintiffs understand and can speak both English and Galician, in addition to their own language, Hebrew.

The plaintiff Tessler, having heard from his partner Goldman that the defendant's house was for sale, called at the defendant's house, and, after some discussion as to the price and the terms, invited the defendant to accompany him to the plaintiffs' solicitor's office. The defendant stated that if they were "going to make a deal," he wanted to get an interpreter, but Tessler told him it was not necessary. There was evidence on behalf of the plaintiffs that before going to the solicitor's office they called at the office of the plaintiff Weidman, where the price and terms were again discussed. This is denied by the defendant, who says that he did not call at Weidman's office until after they had been at the solicitor's office. From the view I take, it is, however, immaterial which story is true. Those who attended at the solicitor's office were Tessler, the defendant, and a son of the plaintiff Weidman.

The only person present who understood the defendant's language besides himself was Tessler, and, as the defendant could not speak English, instructions for the preparation of the agreement were given by Tessler and young Weidman.

After the agreement had been typewritten in English, the solicitor read it over in English, sentence by sentence, to Tessler, and requested him to translate it to the defendant. This Tessler purported to do, and the defendant signed it.

The agreement was in the form of a receipt for $50, but this sum was not paid to the defendant. The defendant says it was tendered to him, but he refused it because he did not understand that what he signed was an agreement. Tessler says it was paid to the solicitor in trust until he should have an opportunity of looking at the title. A receipt for this $50 was given by the solicitor to the defendant. Tessler says a copy of the agreement was also given to the defendant, but on this point I am disposed to believe the defendant, who denies that a copy of the agreement was given to him. His story is borne out by the fact that he afterwards brought a man named Agranovitch to the solicitor's office to translate the document to him. The defendant denies that the document was correctly translated to him. I am satisfied that, whether it was or was not, he was willing to sell on the terms of the agreement, except, perhaps, that providing for the time when the cash payment was to be made, and that he should pay any bonus necessary to be paid to induce the company having the mortgage on the property to accept payment and give a discharge. He denies that he ever agreed to such a term.

Under these circumstances should I award specific performance of the agreement? One of the persons seeking to enforce the agreement is the only person who was present at the time it was executed who could understand the defendant's language or translate the agreement to him. The solicitor could not say whether he was translating it correctly, or whether he was translating it at all. The temptation to state its terms favourably so as to induce the defendant to sign it would be great. It is not to be forgotten too, that, when the defendant suggested getting another interpreter, he was dissuaded from doing so by this plaintiff.

Under these circumstances there is a heavy onus upon the plaintiffs to satisfy the Court that the agreement was freely executed by the defendant after its effect was fully and clearly explained to him—an onus that is not satisfied by the evidence alone of the party seeking its enforcement.

Counsel for the plaintiffs asked for judgment for specific performance of the agreement with the term as to the

payment of the bonus omitted, if the Court should be of opinion that that term did not receive the defendant's assent.

I have serious doubts as to whether the rule as to the enforcement of agreements with a variation should be applied under the circumstances of this case, but, as I have arrived at a conclusion adverse to the plaintiffs upon another ground, I leave this point undecided.

The property was subject to a mortgage for $1,000. The terms upon which the defendant was willing to sell were, price $2,800, payable $500 cash and the balance payable $100 every 6 months with interest at 7 per cent., secured by a second mortgage on the property. Were the plaintiffs ready to carry out an agreement on these terms? The evidence shews that they were not. Clearly the second mortgage spoken of was one second only to a mortgage for $1,000.

What the plaintiffs proposed to do, however, was to raise upon a new mortgage of the property $1,500, pay off the $1,000 mortgage and the $500 cash payment out of the proceeds, and give the defendant a mortgage for the balance, second to this $1,500 mortgage.

In my judgment this is not evidence that the plaintiffs were prepared to carry out the agreement on their part, but rather that they were not so prepared.

The action should be dismissed with costs.

MANITOBA.

MATHERS, J. NOVEMBER 1ST, 1905.

TRIAL.

HEINE v. SCHAFFER.

Church — Members — Trustees — Meetings — Resolution Authorizing New Building—Regularity—Injunction.

The plaintiffs sued on behalf of themselves and all other members of the Trinity German Lutheran Church of Winnipeg.

Defendants Schaffer and Schwab were two of the three trustees of the church, plaintiff Heine being also a trustee.

On 26th December, 1904, the church building was partly destroyed by fire, and on that evening an emergency meeting of the congregation was held, when it was decided to notify the insurance companies to have plans made for re-building.

On 12th January, 1905, a meeting of the congregation was held and a resolution passed authorizing the sale of the church site and the erection of a building north of the railway tracks.

A dispute arose between different factions in the church, and this suit was instituted. Plaintiffs asked for an injunction restraining the defendants and all other officers of the church from selling the church site and from using any portion of the insurance moneys for the purpose of erecting a church elsewhere than on the then present site in Henry avenue.

R. A. Bonnar and G. A. Stewart Potts, for plaintiffs.

T. R. Ferguson and Philip C. Locke, for defendants.

MATHERS, J.:—In my judgment the congregation may, by a majority vote, deal with the church property as they see fit so long as their proceedings to that end are taken in conformity with the law of the province and the constitution of the church. The exercise of this power by the majority may occasionally work hardship upon the minority, but they are in no worse position in that respect than the minority shareholders in any joint stock company. Because they have this great power, however, they must exercise it in strict conformity with the constitution and law governing the church, and strictly comply with all those provisions which are calculated to protect the interest of the minority.

When the church in question was erected in 1891 and 1892, almost the entire membership of the church resided south of the Canadian Pacific Railway yards. Year by year the membership residing north of those yards increased until in December last, when the church was so damaged by fire as to render it unfit for occupation, the majority of the members of the church resided on the north side. The fire occurred in the forenoon on 26th December, 1904, and that night an impromptu meeting of the church board was held, at which a resolution was passed, on motion of Mr. Heine, one of the plaintiffs, seconded by Mauer, another of

the plaintiffs, that Mr. Schwab, an architect, draw up plans "same as church which was destroyed," according to one translation, and "just as the burnt church was," according to another, only 4 feet wider, and furnish an estimate of the cost. There was another meeting of the church board held on 5th January, 1905, at which the following letter, signed by 5 members of the church, was read by the pastor:

"To the Rev. F. W. V. Henning,—Will you please inform the officers of the church that the following motions will be brought before the meeting of the congregation:

"1. To elect new trustees.

"2. To sell the property of the congregation on Henry and Fountain streets.

"3. We also beg that the officers will take care that the books of the treasurer be delivered at the parsonage by 8th January, 1905, by all means, for the purpose to be examined in the presence of the pastor, the treasurer, and the committee of finance. The result to be brought before the next meeting of the congregation.

"C. F. Lehr, F. W. Handel, R. Gauer, A. Buschan, P. L. Deitz."

After some discussion upon it, this document was handed to the secretary for the purpose of being brought before the annual meeting of the congregation, which had previously been called for 12th January, 1905. At the meeting on 5th January the plaintiff Heine and the plaintiff by amendment, Mauer, and 7 others, besides the pastor, Mr. Henning, were present. One item in the minutes of that meeting is as follows: "A conversation then arose regarding the purchase of two lots in the north end of the city. Moved by Mr. Heine, seconded by Mr. Zoller, that two lots be bought on the north side. Accepted."

The meeting of 12th January was a very large and representative meeting of the congregation, over 200 being in attendance. It had been announced from the pulpit by the pastor on the two Sundays immediately preceding, and, as there was a difference of opinion in the congregation as to where the new church should be built, and it was generally known that the matter would be dealt with at this

meeting, the members attended in numbers greatly in excess of the number who attended any previous meeting of the congregation.

After the meeting had been opened, it was moved, seconded, and recorded as carried unanimously, "That in the matter of the building of the church in the question of whether the property corner of Henry and Fountain is to be sold and in what place the new church is to be erected, the members who have joined after the burning of the church shall have no vote."

After this motion had been passed apparently without dissent, the pastor, Mr. Henning, read from the membership roll attached to the constitution of the church, the names of all those who had signed prior to the date of the fire. Section 9 of the constitution provides that those who want to become members of the congregation and have a vote therein must, inter alia, sign the constitution. The signing of the roll was therefore a necessary preliminary to the right to vote. There were a number present who had not signed the roll and whose names were consequently not mentioned amongst those read out by the pastor. A protest was at once entered on behalf of these last named persons, and the right to vote claimed for them on the ground that they had heretofore always been treated as members in good standing. According to the evidence of Mauer, one of the plaintiffs by amendment, and of Schwab and Schaffer, two of the defendants, a motion was made that those present who had not signed the roll should now be permitted to do so. Other witnesses deny that any such motion was made, but all agree that Mr. Henning, the pastor, announced that, to avoid dissatisfaction, those who had not signed would now be permitted to do so and to afterwards vote, and pursuant to this invitation 14 persons came forward and signed the roll.

The following motions were then put to the meeting as appears by the minutes: "Moved by Mr. Schram, seconded by F. W. Handel, that the property on Henry and Fountain be sold and lots acquired north of the C. P. R. tracks. Carried unanimously. In favour, 89. Contrary, 22."

"Moved by Zoller, seconded by A. Parnitzkey, that the trustees be authorized to sell the property on Henry and Fountain streets at once for not less than $5,000, without the building."

"A counter motion was made by J. Schieck, seconded by F. W. Handel, to sell the property on Henry and Fountain with buildings for $5,000 or more. Carried unanimously."

It is argued that these resolutions were carried contrary to the provisions of secs. 22 and 24 of the constitution of the church. These sections are as follows: "22. Each meeting must be announced at a public service on the last of two successive Sundays preceding it. If this has been done there will be a quorum no matter whether the attendance be large or small."

"24. Matters which are to be submitted to the meeting must previously be announced and submitted to the church board for deliberation. If any one submits a matter to the meeting of the congregation, the president is empowered to dismiss the matter from the meeting."

The evidence is quite clear that the meeting of the 12th January was announced at a public service on two successive Sundays preceding that date. It was the regular annual meeting of the congregation, and had as a matter of fact been fixed and announced prior to the burning of the church, so that the provisions of sec. 22 were strictly complied with.

It is equally clear that the question of selling the church property at the corner of Henry and Fountain streets was "submitted to the church board for deliberation" at its meeting held on 5th January. The evidence shews that the notice above quoted was read at that meeting and discussed by the members of the board and was then handed to the secretary, to be brought up at the meeting of the congregation to be held on 12th January. The notice contains no reference to the purchase of a new site for the church, but I am satisfied that the question was also discussed at the meeting. The resolution above quoted for the purchase of two lots on the north side was passed. There is a dispute as to the purpose for which these lots were to be acquired, whether for the principal church or a north side mission; but there is no question that, at that time, the proposition to rebuild the church on the north side was a very live issue before the congregation and was deliberated on at the board meeting on 5th January. I am, therefore, of opinion that the provisions of sec. 24 were complied with.

It was argued that a number of those present at the meeting on 12th January who had not signed the roll produced, had many years previously signed a roll, and therefore that they had a right to vote, although they had not signed that particular roll.

When the present pastor assumed the pastorate he found no membership roll, and he was told by the officers of the church, including the plaintiff Heine, that there never had been a membership roll of the church. Several of the plaintiffs' witnesses swore to having signed some document during the pastorate of a previous pastor, but no satisfactory evidence was given as to what the document was, and there was no evidence that such persons had signed the constitution, as required by sec. 9. Besides, the existence of a previous membership roll seems to have been raised at the trial, for the first time. No such question was raised at the meeting on 12th January, and where membership roll is referred to in the statement of claim, the roll attached to the constitution and which was produced at the meeting is plainly referred to. I cannot, therefore, find that any member entitled to vote at that meeting was excluded from doing so, or that the meeting was in other respects unfairly conducted. On the other hand, I think that the proceedings were conducted with great fairness. If any persons were refused the right to vote because they had not signed the roll, they have no person to blame but themselves, as they were invited to sign it there, and ample opportunity was given them to do so before the vote was taken.

The relief asked by plaintiffs is that defendants and all other officers of the Trinity Lutheran Church be restrained by injunction from alienating, selling, or otherwise disposing of the church site on Henry and Fountain streets, and from disbursing or using any portion of the insurance money received in payment of the loss of the church by the fire on 26th December, for the purpose of erecting a church on the old site.

The question of whether the new church shall be erected on the old site, or elsewhere, is one purely for the congregation to decide in the manner provided by the constitution, and so long as their proceedings to that end are in accordance with the constitution, the Court cannot interpose. Besides, it appears that the insurance moneys were already

spent before the interim injunction in this action was obtained.

On the question of selling the old site, I think the trustees were proceeding as regularly authorized by the congregation in the manner provided for by the constitution. I am not, however, satisfied that any precedent authority from the congregation was necessary. The land is vested in the trustees, and sec. 17 of the Church Lands Act confers upon them authority to sell the lands by public auction upon observing certain preliminary requirements, as to notice, without apparently any antecedent authority from the congregation. A sale by the trustees contrary to the wishes of the congregation is guarded against by sec. 19, which provides that before a deed or transfer is executed, the congregation shall be notified and the sanction of a Judge of the Court of King's Bench obtained.

It was argued by counsel for plaintiffs, that the property in question was vested in the trustees on a perpetual trust for the benefit of all the members of the congregation, and could not, therefore, be sold, except with the consent of all. I have not been referred to any authority in support of this proposition, and I have found none. A church is a quasi-public body, whose business only can be transacted through elected officers, or in general meetings, and, unless the majority ruled, the transaction of business would be impossible. I cannot, therefore, agree with the contention of plaintiffs' counsel on this point.

The question of building north of the C. P. R. tracks is really not before me, but it was incidentally gone into at the trial, and a large number of the plaintiffs' witnesses, including the plaintiff Heine, had no real objection to the erection of a new church on the north side. Their objection was to, what they conceived to be, the irregular way in which the meeting of 12th January was conducted. Considerable ill feeling was engendered at that meeting, and I am inclined to think that this action is the outcome of pique, rather than a feeling that the decision of the majority of the congregation at that meeting involved for the plaintiffs and those they represent, any substantial injustice.

On the whole case I think plaintiffs have failed to make out any case for the interference of the Court. The action will, therefore, be dismissed and the interim injunction dissolved with costs.

BRITISH COLUMBIA.

(NEW WESTMINSTER.)

HUNTER, C.J. NOVEMBER 1ST, 1905.

TRIAL.

JOHNSON v. DUNN.

Contract—Sale of Timber—No Provision as to Time of Performance—Reasonable Time — Time for Commencement and Completion of Work—Notice—Trespass — Damages —Injunction.

Action for trespass for cutting and carrying away shingle bolts. Defendant justified under authority of one Kinney, who held an assignment of an agreement of sale from Johnson to the Hazelmere Mill Company.

Joseph Martin, K.C., and W. Myers Gray, for plaintiff.

J. H. Bowes, for defendant.

HUNTER, C.J.:—The plaintiff is the owner of a quarter section of land, and on 16th October, 1902, entered into a written contract with the Hazelmere Mill Co. Ltd., whereby the latter were to cut and purchase the cedar timber thereon at the rate of 40 cents per cord for shingle bolts. The sum of $150 was paid to the vendor on account of the purchase in December; it was variously estimated that there was between $400 and $800 worth of shingle bolt timber available.

The contract is silent as to the time of performance, and the company on 3rd March, 1905, assigned the benefit of the contract to one Kinney, under whose authority defendant entered and began to cut the bolts in August last, when stopped by an interim injunction.

No written notice was given to the plaintiff of the assignment, and no bolts having been cut pursuant to the contract, the plaintiff notified the company on 13th May, 1905, by a notice dated 12th May, that the carrying away of the timber must be commenced within 2 months from the date

of the notice, and finished within 2 years. Neither defendant nor his principal was served with this notice, but both became aware of it a few days afterwards, and defendant admittedly did not commence work within 2 months of the time when it came to the knowledge of Kinney.

Parol evidence, subject to exception, was given to shew that, at the time of signing the contract, plaintiff had stipulated that the work should commence within 3 months from the date of the contract, and that it should be finished within 3 years. I do not think, however, that it is necessary to consider whether this evidence is admissible, or, if admissible, what its effect, as plaintiff, by giving the notice of 12th May, pursued his rights on the footing that no time was stipulated between the parties.

That being so, it is well settled that the law implies that the contract should be carried out within a reasonable time, having regard to all the circumstances of the case; and that if there is an undue delay on the part of either party, the other has the right to notify him that unless the contract is carried out within a specified time, such time to be a reasonable time to allow for its completion, he will consider the contract at an end: Chitty on Contracts, 14th ed., p. 354; Leake on Contracts, 4th ed., p. 599; and cases cited. Then, if he may fix a time for its completion, I do not see why, when the thing to be done consists not of an isolated act, but of work requiring a considerable period of time, he may not fix a reasonable time for the inception of the work in order that he may know definitely within a reasonable time whether the other party intends to carry out the contract.

Assuming then, that Kinney was entitled to notice, which I very much doubt (no written notice of the assignment having been given to the plaintiff nor the assignment produced), the only question is whether the notice in question was reasonable. In my opinion it is, both as to the time of commencement and as to the time of completion.

The mill company had constructed the greater part of the skidway necessary to get the bolts down to the creek, and the two months allowed by the notice was ample time to enable the defendant to complete the way (a distance of about 60 rods) and to commence getting out the bolts, especially at that time of the year. As to the time fixed for completion, one witness swore that it could be done within 6

months, another that he would like 7 years. In my judgment, 2 years was a reasonable time to allow for taking the cedar timber off this tract. The defendant cannot expect to be allowed such a length of time as would make allowance for all possible contingencies, or would enable him to reap the maximum amount of profit possible at the expense of the plaintiff.

As to the suggestion that the plaintiff was crowding matters with a view to selling to some one else at a larger profit. If the notice was legal and reasonable, as I find it is, the motive is immaterial.

Only nominal damages having been proved, there will be judgment for the plaintiff for $5 and costs. There is nothing in the case to warrant the continuance of the injunction.

BRITISH COLUMBIA.

(VICTORIA.)

NOVEMBER 3RD, 1905.

FULL COURT.

SAYWARD v. DUNSMUIR.

Mechanics' Liens—Materials Furnished at Request of Owner —Authority of Agent — Onus — Limitation of Agent's Powers—Absence of Notice to Material Man—Estoppel— Time for Filing Claim of Lien — Delivery of New Materials after Time Expired — Colourable Delivery to Extend Time — Judgment in Personam — Jurisdiction of County Court—Appeal.

Appeal by defendant from a judgment and order on further consideration made by HARRISON, Co. C.J., in a mechanic's lien action.

The appeal was heard by IRVING, MARTIN, DUFF, and MORRISON, JJ.

H. G. Barnard, for appellant.

H. D. Helmcken, K.C., for defendant Harrison.

R. T. Elliott, for plaintiff, respondent.

IRVING, J.:—By the judgment it was declared that plaintiff had established a mechanic's lien upon the Driard hotel, and that the lien should be enforced, and that further consideration should be reserved.

By the order on further consideration it was adjudged that plaintiff should recover against the defendant Mrs. Dunsmuir judgment for $1,000 and costs, pursuant to the provisions of sec. 23 of the Mechanics' Lien Act, 1900, and also that the plaintiff should recover by virtue of his mechanic's lien his costs of this action.

Mrs. Dunsmuir appeals. Mr. Harrison, who was a defendant, does not appeal. By consent of all parties, the judgment and order on further consideration are to be treated as one final order.

The defendant Mrs. Dunsmuir is the owner of the Driard hotel, the other defendant, Harrison, is the lessee under a lease dated 11th May, 1904, under which he holds the premises for three years from that date.

The lease contains a covenant on the part of the lessor that she will insure and keep insured the premises, and that in the case of destruction or damage to the premises she "will with all convenient speed spend and lay out all moneys received in respect of such insurance in rebuilding or reinstating in a good and substantial manner the premises so destroyed or damaged, and in case such moneys shall be insufficient for such, shall make good such deficiency out of her own moneys."

The lease also contained the following option of purchase:—"Provided also and it is hereby agreed and declared that if the lessee shall at any time hereafter prior to the last month of the term of three years hereby granted give to the lessor one calendar month's notice of his desire to purchase the fee simple of the hotel and premises hereby demised, together with the furniture, fixtures, chattels, and effects aforesaid, then the lessor shall and will on the expiration of such notice and upon payment on the day of the date of such expiration of the sum of $135,000, net cash, together with all accrued rent under these presents up to such expiration, grant, convey, and assign the premises unto the lessee, his heirs, executors, administrators, and assigns, according to the nature and tenure thereof, free from all incumbrances."

A fire having taken place in the Driard hotel on 26th June, 1904, and an adjustment having been made by which $18,905.63 was payable to Mrs. Dunsmuir in respect of the loss, an interview took place on 16th July between Mr. Rogers, Mrs. Dunsmuir's agent, and Mr. Harrison, the lessee of the hotel, as to putting the hotel in order. Mr. Harrison says that Mr. Rogers instructed him to get the work done to the best of his ability and make the best arrangements he could for Mrs. Dunsmuir, and there was at that time no limitation placed upon him whatever; that they there discussed questions relating to the repairs. Mr. Rogers says there was a conversation, but, instead of authorizing Harrison to act for Mrs. Dunsmuir, he gave Harrison to understand that he (Harrison) was to do it—that he (Harrison) was at liberty to order his material where he pleased, and to have his work done as he wished, but Mrs. Dunsmuir would not meet the bills until she saw that the hotel was in as good shape as it was before the fire. Mr. Rogers says:—"My recollection is clear that Harrison then mentioned the question of lumber to me and that I said to him that Sayward had, I believed, the largest business in lumber, but that, as Harrison was his own boss, he could order as he pleased—we had nothing to do with it. In the same way he asked me as to what foreman I should like on the work. I said if we were doing the work or had anything to do with it, we would have Catterall, who was adjusting the loss for us. But Harrison was his own boss, I said, and could employ his own foreman. And he said in that case he would employ Walter Anderson."

Now, that conflict of testimony the learned County Court Judge has found in favour of Mr. Harrison. I think, having regard to what is said by Lord Davey in Montgomerie v. James, [1904] A. C. at pp. 73 and 83, we must accept that decision as correct.

On 18th July Mr. Harrison wrote to Mr. Rogers a letter in the following terms:—"As per your request, I have arranged for repairs on the Hotel Driard and its furnishings. All contracts are let to the best of my ability and in ways that I consider best for Mrs. Dunsmuir and myself. I do not however assume any sort of liability for payments on any part thereof."

Again, on 19th July, Mr. Harrison wrote to Mr. Rogers stating that he was acting as Mrs. Dunsmuir's agent—but that letter will be set out at length later on.

Immediately after the interview of the 16th, Mr. Harrison proceeded to let contracts to various tradesmen; in particular he saw Sayward, the plaintiff, and arranged with him for the supply of lumber on Mrs. Dunsmuir's credit, stipulating that Mrs. Dunsmuir should receive a trade discount of 10 per cent. Lumber was accordingly delivered, the first delivery being dated 16th July—$5.61—the second on 19th.

Lumber was supplied during the months of July and August down to 1st September, at or about which date the delivery of lumber ceased, except as to two items which I shall presently mention. All this was being charged up to Mrs. Dunsmuir, and she was so informed: see letters of 18th and 19th July, written by Mr. Harrison to her agent.

On 19th July Mr. Rogers wrote to Harrison the following letter:—"I beg to acknowledge receipt of yours of 18th inst., contents of which I have noted. In reply to same and in confirmation of our various conversations re repairs to the Driard hotel, I beg to advise that I am authorized by Mrs. Dunsmuir to make the following arrangements with you, viz: You are authorized to superintend and carry out all repairs and improvements to be made on the Hotel Driard and its furniture, fixtures, and machinery, such repairs and improvements not to exceed a total of $17,942.59. You are to confer with me or my representative every day, and report progress and hand in estimates of cost. No material is to be supplied except on your written order, and all bills accompanied by such vouchers and time sheets certified to by your time-keeper are to be turned in at the end of each week, or oftener if occasion may require. Under no circumstances will Mrs. Dunsmuir expend anything further than the above amount upon these repairs to the hotel; and if further liability is incurred it will of course be at your own risk. As you are aware, I have joined in the application for a blanket accident policy to cover guests, employees, etc., the premium for which will be in the neighbourhood of $100, which will be charged against above amount for the time being. Provided that the repairs which you are engaged upon reinstate the hotel in as good or better condition than it was previous to the recent fire, any amount which you may save upon the total cost of such repairs, that is to say, the difference between the cost of such repairs and the above figure of $17,942.59, will be paid to you on completion of the repairs for your own use. Mrs. Dunsmuir also authorizes me to

abate your rent under the terms of your lease for a period of three months from the time repairs are completed. This is as far as my instructions permit me to go, and I cannot advise that Mrs. Dunsmuir, who is at present in ill health, will feel disposed on her recovery to make any further concession. As you are aware, I shall be absent from Victoria for some time to come, and in my absence Mr. G. H. Barnard will act as my representative in the premises. You will kindly report to him as above, and he will have control of the above funds and of all matters connected with the premises. In regard to accident insurances, I shall be obliged if you will notify all your contractors in writing that they are responsible for any accidents that may happen to their employees, and kindly keep and furnish Mr. Barnard with a correct copy of each of such notifications."

This letter, it will be observed, is a very substantial departure from the verbal instructions previously given to Harrison on the 16th, and upon which, as we have already seen, the plaintiff was acting.

On the 19th Mr. Harrison wrote to Mr. Rogers as follows:—"You will also recall that in a conversation had with me many days previous to your letter of the 19th instant you instructed me to get these repairs made. I have all the repairs under contemplation and am having everything done on what I consider the most economical basis possible. In fact, I am doing many things that in my own judgment are being done in too stingy a manner; I am at the same time doing everything in my power to have the total cost come within the figure shewn me by yourself and that published in the daily paper. I have purchased every article at the best establishments I can find and have asked for the very lowest net spot cash prices. I wrote you a letter several days ago on this same subject, and again I will say to you that I will not be responsible for said repairs or any portion of them being done on the Hotel Driard on account of the recent fire, or other causes that may have been in existence previous to the fire. . . . As stated in my previous letters to you, I believe your intention is to treat me right in the matter, and I am certainly doing my part to see that Mrs. Dunsmuir is being given every advantage at my disposal in the matter of repairing her hotel and in the way of catering to the business. In regard to the liability incurred or that may be incurred, and as to whether Mrs. Dunsmuir and you see fit to carry the policy which I had taken out some days

ago, that is a matter for yourselves to consider. You had instructed me to superintend and have made the repairs, and I considered that as your agent it was the proper thing to take out a policy to cover accidents."

The work of repairing was completed—or discontinued—between 2nd and 4th September, and on 10th September all Sayward's bills which had been handed to Mr. Harrison were by him sent to Mr. Rogers.

On or about 10th October, that is, shortly after the 31 days limited for filing a lien had expired, it became apparent that Mrs. Dunsmuir would not pay these bills, alleging as a reason that the amount she had authorized Harrison to expend had been exceeded.

On 29th October Mr. Rogers told Sayward that Harrison had no authority to order.

On the next day Harrison called Sayward's attention to the fact that certain doors ordered in August had not been delivered, and at Sayward's request Harrison gave him a written order to deliver the doors.

The lien was filed on 3rd December, within 30 days of the delivery of the doors. On hearing that these doors had been delivered, Mr. Rogers caused a notice to be posted on the premises under sec. 7 of R.S.B.C. 1897 ch. 132 (sec. 10 of the Act of 1900).

The learned County Court Judge gave judgment for plaintiff for a lien against the Driard hotel and also judgment against Mrs. Dunsmuir personally for $1,000, under sec. 23 of the Act of 1900, and costs under sec. 20 of the Mechanics' Lien Act.

The 4th and 6th grounds of appeal are as follows:—

4. That it was not shewn that the said materials were furnished or supplied at the request of the defendant Dunsmuir.

6. That the evidence shews that the said materials were not ordered by the defendant Dunsmuir or by any person having authority from her in that behalf.

As a discussion of these points brings out most of the facts of the case, we had better deal with them first.

Whether authority has been conferred upon an agent is a question of fact to be proved to the satisfaction of a jury. This fact may be proved by shewing that it was expressly given, or the acts of recognition by the supposed principal

may be such that the jury will infer that the agent was duly appointed. Each case must be decided on its own peculiar circumstances, for what in the eyes of a jury would be sufficient in one case to raise the inference of appointment and the nature of the authority might not satisfy another jury.

It is to be remembered that the burden of proof is on the person dealing with any one as an agent through whom he seeks to charge another as principal. He must shew that the agency did exist and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it.

Now, in this case, as I have already pointed out, Mr. Rogers on the 16th authorized Mr. Harrison to do all things necessary for Mrs. Dunsmuir. For this business then Mr. Harrison was clearly "general agent" for Mrs. Dunsmuir; before his appointment was revoked he had entered into the agreement with the plaintiff that he should supply all the lumber required, and that it should be charged to Mrs. Dunsmuir, who was to have the benefit of a 10 per cent. discount. It was understood between Mr. Rogers and Mr. Harrison, and therefore between Mrs. Dunsmuir and Mr. Harrison, that lumber would be required. It would be well known to Sayward that Mrs. Dunsmuir was the owner of the property, and it would be equally well known to him that she personally would not take any part in the supervision of the repairs. It was known to Mr. Rogers that lumber was being supplied.

After the arrangement with plaintiff had been entered into, and some of the lumber delivered, Mr. Rogers wrote the letter of 19th July limiting Mr. Harrison's powers, but no notice was given to plaintiff. Having regard to the fact that the original appointment was of such a character as to lead plaintiff to believe that it was a general continuing agency, i.e., to continue till revoked or the work completed, I think it was incumbent on Mr. Rogers to give such notice.

If this first appointment had not been a general agency, then I would agree with Mr. Barnard that notice to plaintiff was not necessary, and that it was plaintiff's duty to ascertain from Mrs. Dunsmuir that Mr. Harrison had been authorized to act for her. It has been laid down by high authority that the prudent course for any one dealing with a person acting as the agent of another is to require from the principal a distinct statement as to how far the agency extends. But in this case, owing to the previous general

agency, I think the proper conclusion is that Mrs. Dunsmuir permitted Harrison to hold himself out as her agent on and after 19th July. The extent of Harrison's authority as between Mrs. Dunsmuir and plaintiff could be measured by the extent of the authority conferred on him by the previous agency. Or perhaps it would be better to put it this way: that Mrs. Dunsmuir, having on 16th appointed Mr. Harrison her general agent for the making of these repairs, is estopped from setting up the limitation subsequently placed upon his powers as against plaintiff, who acted bona fide, and to whom no notice was given of the subsequent limitation.

As a matter of fact Sayward did not know that Harrison derived his authority to act as Mrs. Dunsmuir's general agent from Mr. Rogers. Sayward did believe that Harrison was, in some way or other, authorized to pledge her credit. The fact that he was not aware of the true source of authority cannot, in my opinion, make any difference: see Hambro v. Burnand, [1904] 2 K. B. 10, where the defendants were held liable on certain written authorities given by them, notwithstanding that they were not shewn, nor was their existence known to the plaintiffs.

The plaintiff's claim to lien is resisted on the ground that the claim was filed too late, and that the last two items, namely, door casings, were ordered and supplied for the express purpose of extending the time so as to enable Mr. Sayward to file a lien. The material was delivered as follows:—

Between 16th July and 1st September (many items) $1,237.21. On 5th November 2 door frames and cartage, $5—$1,242.21. If the delivery of these two door frames does not extend the time for filing the lien, the plaintiff must fail so far as his lien is concerned, as the time for filing a lien in respect of the items delivered before 1st September would have expired on or about 4th or 5th October. The lien affidavit was filed on 3rd December, 1904, within the 31 days limited by sec. 8 of ch. 132, as amended by sec. 12 of the Act of 1900.

In Morris v. Tharle, 24 O. R. 159, and Robock v. Peters, 13 Man. L. R. 125, the case of materials being supplied from time to time under a general arrangement previously entered into was considered.

Having regard to those decisions, it appears to me that, in the circumstances of this case, if the material was supplied in good faith and for the purpose of completing an

order previously given, and not colourably to revive the lien, the delivery of such material would extend the time for filing the lien in respect of the earlier items.

Whether the material was supplied in good faith for the purpose of completing the contract or as a mere dodge to revive the lien, was a question of fact for the County Court Judge, and as he has found that point in favour of plaintiff, his decision on that fact should govern us.

Mr. Barnard relied upon Summers v. Beard, 24 O. R. 641, but that case, which was the case of a contractor being called in, after the completion of the contract, to remedy defects, has no application to the case of material bona fide ordered and supplied under the original agreement: see Robock v. Peters, per Killam, J., at p. 136.

As a consequence of Mr. Harrison being held authorized to pledge Mrs. Dunsmuir's credit, jurisdiction was conferred by sec. 23 of ch. 20, 1900, the Mechanics' Lien Amendment Act, 1900, upon the County Court Judge to give judgment in the same manner (i.e., in personam) and to the same extent (i.e., up to $1,000) as if such indebtedness had been sued upon in the County Court in the ordinary way. I think this jurisdiction would attach, even if the claim for a lien were to fail.

I would dismiss the appeal.

MARTIN and DUFF, JJ., each gave reasons in writing for the same conclusion.

MANITOBA.

MATHERS, J. NOVEMBER 20TH, 1905.

TRIAL.

CAMPBELL v. IMPERIAL LOAN CO.

Mortgage—Action for Redemption—Sales by Mortgagees under Power of Sale—Redemption Subject to Sales—Addition of Purchasers as Parties.

On 26th February, 1890, one McLaurin mortgaged to the defendants sections 17 and 31 and the north-west quarter of section 33 in township 15, range 22 west, in Manitoba, to

secure the repayment of $1,250 then advanced to him. McLaurin by quit claim deed dated 22nd December, 1894, conveyed the lands to plaintiff, who brought this action for redemption.

A. J. Andrews and R. M. Noble, for plaintiff.

H. M. Howell, K.C., and G. R. Coldwell, K.C., for defendants.

MATHERS, J.:—The defendants by their statement of defence allege that default was made in payment of the mortgage moneys, and, pursuant to the powers contained in the mortgage, they on 22nd December, 1899, sold section 17 to John Morton, for $1,300, and on 1st June, 1901, sold the south half of section 31 to D. S. McMurachy for $900, and that they also sold the north half of section 31 for $1,600. It is further alleged that these purchasers went into possession of the properties, and have ever since continued in possession thereof and have paid part of the purchase money, and they submit to redemption, subject to these several agreements of sale.

It appeared from the evidence that Morton, who bought section 17, has paid $200 on account of principal under his agreement and all the accrued interest, and has also paid the taxes assessed against the land since the date of the agreement; and he now claims the land as owner thereof; McMurachy, who bought section 31, at once took possession and broke 100 acres. He has since remained in possession and has cultivated and cropped this 100 acres. He has paid $760 on account of the purchase price and all the accrued interest. He also claims the land as owner. An agreement of sale of the north half of section 31 by the defendants to O. W. Hodgkinson for $1,600, dated 15th January, 1903, was put in evidence, but it does not appear how far that agreement has been performed, or what acts of ownership the purchaser has performed thereunder.

None of these purchasers were made parties to this suit, and they are not now before the Court.

At the trial I intimated my opinion to be that a judgment for redemption of the whole land could not be pronounced in the absence of these purchasers.

Counsel for the plaintiff , however, strongly argued that such was his right, and that it appeared from the evidence that the power in the mortgage under which the several

sales were made was defectively exercised, and, that being the case, the Court should decree redemption without reference to the purchasers.

With some hesitation I reserved this point and let the case proceed. I have since carefully considered the question of parties. The Court is always unwilling to prolong litigation or increase its expense, but I have reluctantly come to the conclusion that, in this case, no judgment for redemption can be pronounced that does not provide for a reconveyance subject to the several agreements of sale above mentioned, unless the purchasers are made parties to this suit. Any other judgment must provide for a reconveyance upon payment of the amount found to be due upon taking the accounts. Such a judgment cannot be carried into effect without depriving the purchasers of their rights under the several agreements, and should not be pronounced until the question of the validity of the several sales has been determined in plaintiff's favour. It is surely not open to argument that the men whose title to the lands they occupy depends upon that question should be given an opportunity to be heard before this Court by its judgment directs that these lands be conveyed to the plaintiff.

In holding that the purchasers are necessary parties I am not laying down any new principle. It is stated in Coote on Mortgages, p. 741, that in an action for redemption, where the original mortgagee has transferred the mortgage debt and security, the transferee is a necessary party. The same principle is stated in Fisher on Mortgages, sec. 1695.

Jenkins v. James, 2 Giff. 99, was an action for redemption after a sale by the mortgagee. It was alleged that the power of sale had been oppressively used, in that the sale was made after a tender of the mortgage moneys. There the purchaser was made an orginal party defendant. In Minn v. Stant, 15 Beav. 49, the mortgagor brought an action for the surplus purchase money from a sale by the mortgagee. It was held that the purchaser was not a necessary party, as the mortgagor expressly offered to ratify the sale. Had the mortgagor, as here, sought to impeach the sale, the decision would, no doubt, have been different.

The notice of sale posted up by defendants cannot help the plaintiff over the difficulty as to parties.

The rights of the purchasers are in no way affected by that notice.

It was argued by counsel for plaintiff that the purchasers could be made parties in the Master's office and that that was the proper place to bring them in. I cannot agree with that contention. The only provision for adding parties there other than subsequent incumbrancers is Rule 40.

That rule, however, is confined to cases where no direct relief is sought against the parties to be added: Rolph v. U. C. Building Co., 11 Gr. 275; Hopper v. Harrison, 28 Gr. 22. Here the most important relief is sought against the purchasers, namely, that their agreements to purchase be set aside.

Having arrived at the conclusion that plaintiff cannot succeed without making the several purchasers parties, I have not considered the other very important questions argued.

If the plaintiff decides to amend by adding the several purchasers as parties, she may do so within two weeks, upon payment of the costs of the trial already had. In default there will be the usual judgment for redemption referring it to the Master to take the accounts, and upon payment of the amount so found due a reconveyance by the defendants subject to the several agreements of sale above mentioned.

Should the plaintiff desire to appeal, she may, in the event of the appeal not succeeding, amend within 2 weeks after the appeal is disposed of.

NORTH-WEST TERRITORIES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. SEPTEMBER 15TH, 1905.

TRIAL.

WAUGH v. GRAYSON.

Building Contract—Architect's Certificate—Condition Precedent to Action—Counterclaim—Defective Work—Acceptance—Delay—Waiver.

Action by Christopher Waugh against John Grayson, George Sharpe, William Grayson, and John Bellamy, trustees

of a Methodist church, to recover the balance due to plaintiff as contractor under a written contract for the building of a parsonage-house.

W. B. Willoughby, Moosejaw, for plaintiff.

William Grayson, Moosejaw, and Charles E. Armstrong, Moosejaw, for defendants.

NEWLANDS, J.:—The contract provides that the work is to be done to the satisfaction and under the direction of Robert Beard, to be testified by a written certificate under the hand of the said Robert Beard. Payment was to be made as follows: 70 per cent. of the work done every 2 weeks, and the balance upon the expiration of 30 days after the completion and acceptance of the building, provided that in each of the said cases a certificate be obtained and signed by the said Robert Beard, architect, that the work, upon the completion of which said payments are respectively to be made as aforesaid, has been done in good, workmanlike, and substantial manner, and in accordance with this contract and said drawings and specifications.

I think the parties by this provision in their contract have made the production of a certificate signed by Beard a condition precedent to the bringing of an action, and, as he has given no certificate that the work has been completed to his satisfaction, the plaintiff cannot recover in this action.

The defendants counterclaim for damages on account of the plaintiff not completing the building according to the plans and specifications. The plaintiff did the work under the supervision of Mr. Beard, who gave him certificates for $3,411, withholding only $100 for the completion of the building. I therefore think that the defendants cannot counterclaim for general damages on account of defective work which was passed by Mr. Beard, and paid for under his certificates. The defendants are bound by Mr. Beard's certificate that the work was according to contract. They also claim damages because the building was not completed until 20th December instead of 1st September, at the rate of $5 per day, as fixed by the contract. I think the defendants by their action have also waived this claim, first, by making payments after 1st September on Mr. Beard's certificate, and second, by accepting the house without making any mention of this claim. As to the special damages set out in the counterclaim, I think the amount retained by the plaintiff

is sufficient to cover them. Judgment will therefore be for the defendants with costs.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. OCTOBER 20TH, 1905.

TRIAL.

SJOSTROM v. GALE.

Account — Work Done and Services Rendered — Set-off — Counterclaim—Cross-accounts—Costs.

Plaintiff claimed money owing to him by defendant for board, stabling horses, and various kinds of work done and services rendered, and for damages for injury to crop, etc. Defendant asserted a set-off and counterclaim for similar work and services, and for damages for destruction of straw, etc.

The parties were farmers and neighbours, and were in the habit of rendering services to each other.

E. L. Elwood, Moosomin, for plaintiff.

J. T. Brown, Moosomin, for defendant.

WETMORE, J., after reviewing the evidence and going carefully over all the items, allowed plaintiff $131.30, and a set-off to defendant of $53.13, leaving a balance in favour of plaintiff of $78.17, for which judgment was directed to be entered with costs of the action. On the counterclaim judgment was given for defendant for $15, with costs solely applicable to the counterclaim. The costs of both action and counterclaim to be taxed on the lower scale. There was to be only one taxation of costs, and one judgment was to be set off against the other, and the party in whose favour the balance might be after set-off, to have execution therefor.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. OCTOBER 20TH. 1905.

TRIAL.

WELWYN FARMERS' ELEVATOR CO. v. BYRNE.

Bailment—Storage of Wheat—Increase of Bailor's Wheat by Leakage from Neighbouring Bins—Damage to Bailor's Wheat by Reducing Grade—Claim and Counterclaim—Costs.

Action to recover the value of certain wheat which, plaintiffs alleged, leaked into the bin in plaintiffs' elevator in which defendant's wheat was stored, and of which defendant obtained the benefit upon a sale.

Counterclaim for damage to defendant's wheat by being mixed with inferior wheat.

E. A. C. McLorg, Moosomin, for plaintiffs.

J. T. Brown, Moosomin, for defendant.

WETMORE, J.:—The defendant put into plaintiffs' elevator a quantity of grain for storage. This grain was put into a separate bin, and was to be kept separate. The quantity of wheat so put in, after deducting what is called "dockage," amounted to 1,279 bushels and 30 lbs., according to the elevator weights. All the wheat that was in this bin was taken out and loaded in a car for defendant and shipped to Fort William. Plaintiffs allege that a quantity of wheat leaked from bins containing grain of other persons into defendant's bin, and that it was therefore shipped for defendant to Fort William, and that he got paid for more wheat than he put in the elevator, and that defendant should account to them for and pay them the difference. The surplus claimed is 114 bushels and 50 lbs. The wheat so alleged to have leaked into defendant's bin was wheat owned by one Swanson, which was in a bin on one side of defendant's wheat.

and wheat owned by McBean Bros., which was on the other side of it. The evidence that Swanson's wheat leaked into this bin is of a very unsatisfactory character, and practically it only amounts to this, that Swanson was 50 bushels short, and the construction of his bin was of such a character that it is possible that his wheat might have leaked into defendant's bin. This amounts to nothing more than conjecture. As to the wheat leaking from McBean Bros.' bin into defendant's, the evidence is not as satisfactory as it should be. The mouth of the spout by which their wheat was conducted into their bin was some distance above the top of the bin. Usually the mouth of the spout goes into the bin below the top of it, and when the wheat gets up level with the mouth it will refuse to run into the bin and will choke the spout up; but in the case of McBean's bin, the mouth of the spout being above the top of the bin, the grain would not choke the spout up, and it would continue to run, and of course it might naturally run into the adjoining bin, and that is just what is alleged to have happened in this case. No doubt a portion of McBean Bros.' wheat did run into defendant's bin, but the direct evidence as to the quantity is of a most unsatisfactory character. According to the testimony of Pateman, the principal witness for plaintiffs, and their elevator man and agent, he could not say what the quantity was; it might have been 5 bushels and it might have been 50. All I can say is, that under such evidence it might have been no more than one bushel, and therefore a quantity so trifling that it is not worth mentioning. Whatever it was, plaintiffs, who loaded defendant's car, loaded the whole of the contents of defendant's bin into the car. But plaintiffs assert that the quantity of wheat contained in that car when it reached Fort William was 1,394 bushels and 20 lbs. There is no direct evidence whatever of what that car contained when it reached Fort William. Plaintiffs offered in evidence what they alleged was a certificate by the weighmaster at Fort William under the Dominion Act of 1904, ch. 15, sec. 58. It was rejected by me because it was not in accordance with the provisions of that section. There was evidence to establish that defendant was paid for 1,394 bushels and 20 lbs. of wheat as the proceeds of the shipment; that is, he was paid that amount by the bank, and it was urged on the part of plaintiffs that that was evidence to establish that the quantity of wheat that reached Fort William in the car in question was

1,394 bushels and 20 lbs. Possibly that may be prima facie evidence to establish that the car on its arrival at Fort William contained 1,394 bushels and 20 lbs., and put defendant to proof to rebut it. But under the evidence it was not established to my satisfaction that the difference was by reason of other wheat than defendant's getting into his bin, or, in other words, that the wheat that reached Fort William was not practically only the wheat that the defendant had stored in his bin at Welwyn. It appears that differences between the measurements at Fort William and at Welwyn were of not uncommon occurrence. It was necessary, in my opinion, to have gone one step further and have established that there was a corresponding shortage in McBean Bros.' wheat. That was not established, and I am of opinion therefore that plaintiffs have not made out their case. Possibly this conclusion may do justice, because I think the whole trouble in this case has arisen from defective construction and management of plaintiffs' elevator.

Defendant has counterclaimed, alleging that other wheat was allowed through the negligence of plaintiffs to get mixed with his wheat, and so destroyed the grade, and he received less for it than he otherwise would. It is not very distinctly proved what defendant's wheat graded at Fort William or what it graded at the elevator at Welwyn. It seemed, however, to be assumed by counsel on each side that it graded at both places No. 2 northern. Defendant in the course of his testimony, especially on his cross-examination for discovery, testified that he was satisfied with the grading at the elevator. However, it is not necessary to make any extended remarks in this connection, because the weight of evidence establishes to my satisfaction that defendant's wheat was not of a higher grade than No. 2 northern, and that no wheat of an inferior grade was allowed to run into his bin and get mixed with it. That is, whatever wheat did run into his bin, if any, was quite as good in grade as defendant's wheat, and defendant's was not therefore damaged.

The result is that there will be judgment for defendant on plaintiffs' statement of claim, with costs, and for plaintiffs on defendant's counterclaim, with costs. There will be one taxation of costs; and one judgment will be set off against the other, and the party in whose favour the balance may be will have execution for such balance.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. OCTOBER 27TH, 1905.

TRIAL.

PINKI v. WESTERN PACKING CO.

Contract—Goods Sold—Services Performed—Money Paid—Account — Items — Commission — Evidence — Admissibility.

Action for the price of cattle sold, services performed, and moneys paid on behalf of defendants by plaintiff under agreements with defendants.

E. L. Elwood, Moosomin, for plaintiff.

E. A. C. McLorg, Moosomin, for defendants.

WETMORE, J.:—A great deal of testimony was admitted in this case which in my opinion was inadmissible. In the first place, I allowed plaintiff to testify that on several occasions when he was purchasing some of the cattle in question he stated that he was doing so on behalf of the Western Packing Company. Testimony was also given by persons from whom some of these purchases were made, that plaintiff stated in making the purchase that he did so on behalf of defendants. I have come to the conclusion that this testimony was inadmissible for the purpose of proving that plaintiff had authority from defendants to make these purchases. A number of letters written by plaintiff were also put in evidence at the examination of one McLeod for discovery. These letters were not admissible on any principle whatever. I may say, however, that I have not been influenced by any of this objectionable testimony which I have mentioned in reaching the conclusion which I have reached. I have arrived at such conclusion by evidence entirely independent of this objectionable testimony. It is quite immaterial to determine whether Penland in making the contract of 2nd January, 1903, professedly between plaintiff and Paul and Penland, acted as the agent of defendants, because I find under the evidence that Paul and Penland's interest in that contract was assigned to defendants on 15th January, 1903, and that the

cattle which were forwarded under that agreement in May of that year were forwarded to defendants and were received by them, and that they are liable to pay therefor.

Some items mentioned in the claim in plaintiff's particulars were admitted . . . amounting to $5,020.25.

It was alleged on the part of defendants that the cattle shipped on 15th May, 1903, were not as represented in plaintiff's particulars; for instance, it is said that a number of the yearling steers were bulls, and that it was agreed that they should be paid for at the same rate as yearling heifers. Then it is claimed that four stags were in this shipment and that they were only worth $20 a piece. There were other differences, but it is not material to mention them, because I find that as to the yearling bulls which were shipped it was agreed by Paul that they should be received at the same price as yearling steers, and I find that there were no stags in the shipment, and as to the other animals shipped and received by defendants they were as represented by plaintiff in his particulars, and that the prices charged for these animals are correctly set out in such particulars.

It was contended that the two-year old steers should only be paid for at $25 each. It was set up that this agreement of 2nd January was altered in so far as these steers were concerned from $25 to $25.50. The evidence establishes to my satisfaction that this alteration was made by Penland at or about the time of the making of the contract. Plaintiff has sworn to that fact, and he was not contradicted. I have therefore allowed these steers at $25.50.

It was contended also that another alteration had been made in this agreement after it was signed, and that is that the price of three-year old steers had been changed from $33 to $35. There seems to have been some writing over these figures, but I cannot make out anything else than "$33" from it. At the trial it was conceded to have been changed to $35, but I cannot make that out. At any rate it makes no difference, because Paul, who unquestionably was defendants' manager in the west, admitted in his evidence that he agreed to pay plaintiff $35 a head for these steers, upon Pinki representing to him that he could not buy good steers of that age at a profit at $33.

I will therefore allow the plaintiff: 155 yearling steers at $18, $2,790; 57 yearling heifers at $17, $969; 32 cows and heifers in calf at $36, $1,152; 27 dry cows at $30, $810; 90

two-year old steers at $25.50, $2,295; 72 three-year old steers at $35, $2,520; amounting to $10,536.

I will also allow plaintiff for the amount paid for inspecting fee, $25.50. I am satisfied that this payment was authorized by Paul.

That will make the amount so allowed to plaintiff $15,581.75.

There is a claim for going to Medicine Hat for horses. The evidence with respect to that is not satisfactory. What plaintiff sets up with respect to this charge is that he went on two occasions to Medicine Hat at the instance of Paul to purchase horses, and that when he got there he found that Paul had no horses. In the first place, I may say that the evidence does not satisfy me that such was the case, that Paul had no horses. On one occasion at any rate I am satisfied that he did have horses, but that he and plaintiff could not come to an agreement as to the price of them. Plaintiff sets up that Paul promised to pay him these expenses. I am not satisfied that such was the case; Paul denies it, and plaintiff is evidently very much at large as to what he paid out for such expenses. I am of opinion that if Paul really had made such a promise, plaintiff would have been more particular in keeping some evidence of what these payments were. As to the amount of them his testimony was of the vaguest character. That claim cannot be allowed.

The principal contest in this action arose over moneys to a considerable amount paid by plaintiff to various farmers on account of the purchase of cattle from them. Plaintiff represents that he was employed to purchase cattle for defendants, and that he was to be paid $1 a head commission, that the prices he agreed to pay for the cattle so purchased were approved of by Paul, as defendants' manager, but when the time for shipment arrived defendants refused to accept these animals at the price plaintiff agreed to pay for them, but were willing to take them at the market price. (These cattle amounted to 165 head). The owners of the cattle, however, refused to deliver them at the market price, which was lower than the price so agreed to be paid, and, the balance remaining unpaid upon the bargain not being forthcoming, they took the cattle home and retained the money; and plaintiff claims to be refunded for the money so paid on account. Paul denies that plaintiff was authorized to purchase cattle in this way, or that there was any

bargain to pay him $1 commission. An agreement in writing signed by Pinki was made with respect to these 165 head, and a very great deal of conflicting testimony was given over that document. This document is dated 13th June, and is as follows:

"June 13, '03.

"The Western Packing Co. of Canada, Ltd. "Med. Hat Ass.

"Dear Sirs,

"I James Pinki do agree to deliver to the Western Packing Co. of Canada, Ltd., 165 steers three years old, said steers to be delivered when notified, at their market value."

"Jas. Pinke."

"Wit. J. M. Paul."

Plaintiff and one of his witnesses swear that this document was materially altered since it was signed. It is not disputed that the name "Jas. Pinke" signed to it is the handwriting and signature of plaintiff. It is clear that only one document referring to these 165 steers was signed by plaintiff at Medicine Hat, and it is also equally clear that whatever document was signed on that occasion was read aloud by Paul and was read by plaintiff. It was testified to by plaintiff and Fodor, the other witness that I have mentioned, that this document was signed on 20th May, and not 13th June, and that the words "June 13, '03," "The Western Packing Co'y of Canada, Ltd.," "Dear Sirs," and "Market Value" were inserted after this document was signed. Paul utterly denies that except as to the words "The Western Packing Co'y of Canada, Ltd.," which have evidently been put there with a stamp. That he states was stamped afterwards. There would be nothing fraudulent in doing that if the date and the words "market value" had not been inserted. Paul states circumstantially how that document came to be written and executed, and he swears that it is just as it was when executed, with the exception of these words I have referred to being stamped on it. Fodor gives a very extraordinary account of this transaction. He went there, I should say, as a sort of supercargo with plaintiff in taking cattle from Whitewood to Medicine Hat. He was in no way interested in the dealings between plaintiff and defendants, and he testifies in effect that he stood or sat by Paul when he was writing this document, that he had it in his hands and read it over, and he swears that these words which I have referred to were not in it. I have closely examined

the document, and I have come to the conclusion that these words were not inserted after the execution, that they were there at the time that Pinki signed it. The document appears to have been written all at the one time, and I cannot bring my mind to the conclusion that if these words had been inserted afterwards there would not have been some perceptible difference in the shade of the ink and also in the character of the writing. There is none whatever. The shade of the ink is all the same, and the document seems to have been written in an even, free, running hand all at the same time. I think this is more pronounced when I consider that Fodor swore that he thought that the document as signed by Pinki had been blotted with a blotting paper. If that was so, the other words must have been written after such blotting, and if it had been so blotted there would have been a marked difference in the shades of the ink.

In support of the fact that the document so signed by the plaintiff was not in the state it presented at the trial, as well as of the fact that the plaintiff was to have been paid by commission, evidence was given by Fodor and one Gemmell, that they had heard Paul state that plaintiff was to be paid a commission of $1 a head on these purchases. Nobody else testified to that except plaintiff himself. None of the parties in whose presence this statement was alleged to have been made, especially Dunand and Archibald, who were called as witnesses, testified to that fact at all. I was not very strongly impressed with a considerable portion of the testimony of Gemmell, nor was I with the testimony of Fodor. I may add that I am of opinion and find in fact that this document was signed on 13th June. It is clear that plaintiff was there on that date, and he stated on his examination for discovery that these 165 head of cattle were discussed on that occasion. He denies that at the trial, but there was the fact stated before the examiner, which was put in evidence. And I also find that when it was signed the witness Fodor was not there at all. Having found that this document was practically in the state it now is in when plaintiff signed it, disposes of this branch of the case, and I will not allow for the amount advanced on account of these animals. There is no escaping the effect of this document. It was an agreement to pay for these 165 steers at the market price when delivered at the time notified for delivery, and the learned counsel for plaintiff conceded that to be the proper construction. The fact is, in my opinion, that plaintiff made an agreement to sell these

cattle at their market value when delivered, hoping for a rise in the market, and as a matter of fact the market fell.

There is a claim also of $7.50 for exchange on draft. This was a draft made on defendants for the purpose of recovering deposits on account of cattle. My findings, which I have just stated, dispose of that claim, because I find that defendants, or Paul, never agreed to accept a draft for that purpose. He had already overpaid plaintiff what he owed him.

The credits to which defendants are entitled are set out in the particulars forming part of plaintiff's statement of claim, except that the draft for $700 should be $7, and the draft for $1,002.50 should be $1,500. With these changes these credits amount to $15,919.40.

It was contended on behalf of defendants that they should be credited on the $1,500 draft with $3.75 more. That draft was drawn for $1,500 with exchange, and the $3.75 represents the exchange. So far as the result of this case is concerned, this $3.75 does not make any difference, and I do not consider it necessary to determine the question.

As stated, the gross amount of the credits without that is $15,919.40. That is $337.65 more than the amount that I have found in favour of plaintiff. There has been no set-off or counterclaim pleaded, and defendants have not claimed the balance. I presume they had their own reason for so doing, and therefore I make no award of any balance in their favour. I simply give judgment for defendants with costs.

NORTH-WEST TERRITORIES.

(ASSINIBOIA.)

WETMORE, J. OCTOBER 27TH, 1905.

CHAMBERS.

HANDLEY v. SCOTT AND WARREN.

Judgment—Default of Defence—Time for Filing Defence—Computation—Vacation—Sunday—Irregularity.

Application by defendant Warren to set aside the judgment against him, for irregularity, and to be let in to defend, on the merits.

E. L. Elwood, Moosomin, for defendant Warren.

T. D. Brown, for plaintiff.

WETMORE, J.:—The appearance for defendant Warren was entered on 13th September last, and, of course, during vacation. On 6th October plaintiff signed judgment by default against both defendants. Defendant Warren contends that he had 5 days from the last day of vacation, that is, 30th September, to file his defence, and that in computing such time the first day should not be included, because that day was a Sunday. Rule 549 of the Judicature Ordinance, which provides for a vacation, contains the following: "If the time for delivering a defence in a cause in which the defendant has appeared has not expired previous to the first day of August, it shall, without any order to that effect, stand extended until the expiration of 5 days after the last day of vacation." Now, this case clearly comes within that provision, and defendant Warren had 5 days from 30th September to file his defence. Rule 546 provides: "Where any limited time less than 6 days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, the days on which the offices are closed under the provisions of this Ordinance and the Rules of Court shall not be reckoned in the computation of such limited time." Sunday is one of the days on which the clerk's office is closed under provisions of that Ordinance. It was urged, however, that the 5 days allowed under Rule 549 did not apply, because the time limited for filing a pleading was 6 days from the time of entering an appearance, and that that was the limited time intended by Rule 546, and that under the provisions of Rule 549 no time was "appointed or allowed" for doing the act or taking the proceeding. Rule 549 simply gave an extension of time. It did not "appoint or allow" a time. I am not able to appreciate the force of this argument. I am of opinion that this case comes directly within the meaning of Rule 546. The time limited for filing the pleading was 5 days after the last day of vacation, that is, it was less than 6 days from or after a specified date, and it was clearly the time allowed by virtue of the Ordinance to defendant Warren for filing his defence. This judgment was signed too soon. Warren had the whole of the 6th to file his defence. It would seem by the affidavits, however, that it is possible that judgment might have been signed against him before his defence was filed on the 7th. Owing to an accident it did not arrive until the 7th, and therefore plaintiff might possibly have got in and signed his judgment on the 7th before the pleading was filed. That might or

might not have been the case. There has been a clear irregularity in signing this judgment, and defendant Warren is entitled to have it set aside as a matter of right, and with costs.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. OCTOBER 28TH, 1905.

CHAMBERS.

HOURSTON v. SPENCE.

Writ of Summons—Irregularity—Action in Name of Next Friend—Consent of Next Friend not Filed—Application of English Rule—Death of Plaintiff—Revivor—Effect on Previous Irregular Proceedings.

Application by defendant to set aside the writ of summons and all proceedings, on the ground (amongst others) that no consent of the next friend of the original plaintiff was filed pursuant to the Rule in that behalf.

C. F. Newell, Edmonton, for defendant.

O. M. Biggar, Edmonton, for plaintiffs.

SCOTT, J.:—The action as originally constituted was brought by Thomas Hourston, a person of unsound mind not so found by inquisition, by David G. McQueen, his next friend, against the defendant, to set aside transfers of certain moneys and lands made by Thomas Hourston to the defendant, which are alleged to have been obtained by her from Hourston by undue influence. The then plaintiff died after the commencement of the action, and an order was obtained on 3rd May last substituting the present plaintiffs as plaintiffs, they being his executors.

The writ of summons in the action was issued from the office of the deputy clerk here on 3rd April, 1905. On 6th April Hourston was declared a lunatic, and the present plaintiffs were appointed the guardians of his estate. He died a few days after the order was made.

Order 16, Rule 20, of the English Rules provides that "before the name of any person shall be used in any action as next friend of any infant or other party, or as relator, such person shall sign a written authority to the solicitor for that purpose, and the authority shall be filed in the central office or in the district registry if the cause or matter is proceeding therein."

No such authority was filed in the office of the deputy clerk before the issue of the writ of summons, but what purports to be such an authority was filed therein on 11th April following.

It was contended on behalf of plaintiffs that the Rule referred to, by reason of its inapplicability, is not in force here, as there are not here any such offices as those mentioned in it.

Under the English Rules the central office appears to be the office in London in which all proceedings in actions there are carried on, and the district registries the offices in which proceedings in actions in other parts of England are carried on. They appear to correspond in all respects with the offices of the clerks and deputy clerks of this Court, and, as sec. 21 of the Judicature Ordinance provides that, subject to the provisions of the Ordinance, the practice and procedure of the Supreme Court in England shall be followed as nearly as possible, I am of opinion that the Rule referred to is in force here, and that the consent of the next friend should be filed in the office of the clerk or deputy clerk in which the proceedings in the action are carried on.

It was also contended that the Rule referred to does not require that the consent of the next friend shall be filed before the issue of the writ of summons in the action.

In my view, the Rule plainly indicates that the consent shall be filed before the name of the next friend shall be used, and, as his name must be used before the issue of the writ, it follows that the consent must be filed before it issues.

A further contention is that the omission to file the consent is one which does not go to the root of the action, and Ex p. Brocklebank, 6 Ch. D. 358, was cited as supporting this view. In that case it was held that an action may in certain cases be instituted by an infant without the interposition of a next friend. In this action the name of a next friend was used contrary to the express provisions of the

Rule referred to. The fact that the provisions of the Rule were not fully complied with would not, I think, warrant my treating the action as one brought without a next friend. Even if I should be justified in so treating it, I doubt whether it could reasonably be inferred from the judgment in Ex p. Brocklebank that a person of unsound mind, who in the statement of claim is alleged to be such, could sue without a next friend.

If before the present plaintiffs were substituted, an application had been made by the defendant to set aside the writ and proceedings upon the ground of non-compliance with the provisions of the Rule referred to, the defendant would, in my opinion, have been entitled to an order to that effect, but they have been substituted, and, as they appear to be entitled to institute such an action as this, it is necessary to determine whether, in view of the defect in the prior proceeding, they are entitled to continue this action.

No authorities were cited upon this point, nor have I been able to refer to any bearing upon it. I think, however, that, as the defect is one which strikes at the root of the action, it was not cured by the substitution of the present plaintiffs, and that therefore they are not entitled to proceed with it.

In this application it was also sought to set aside the amended statement of claim, on the ground that it disclosed no cause of action, inasmuch as it was not alleged that plaintiffs had proved the will of the deceased.

It would appear from the form of statement of claim by an executor given in appendix C, sec. 2, form 4, and the similar forms given in Bullen & Leake's Precedents, that such an allegation is unnecessary.

Order to go setting aside the writ and all proceedings herein. Defendant to have costs of the application.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. OCTOBER 25TH, 1905.

CHAMBERS.

TURNER v. VAN METER.

Trial—Jury—Severing Issues—Rule 170.

Motion by plaintiffs for leave to set this cause down for trial. Upon the return of the motion defendants signified

their desire to have the issues of fact tried by a Judge with a jury.

O. M. Biggar, Edmonton, for plaintiffs.

F. C. Jamieson, Strathcona, for defendants.

SOTTT, J.:—The object of the action is, first, to obtain a declaration that defendant B. A. Van Meter by his conduct is estopped from denying that he was a partner of the firm of Van Meter & Blades at the time the debts due by that firm to the plaintiffs were contracted; second, to set aside as fraudulent and void, as against creditors of that firm, conveyances of certain real estate, the property of that firm, made by defendant Blades to defendant B. A. Van Meter, and of certain cattle, the property of defendants Blades and F. C. Van Meter, made to the same defendant; third, to compel defendant F. C. Van Meter to convey to plaintiff Buyers, for the purposes of the trusts under the assignment to him for the benefit of the creditors of that firm, certain lands purchased by that defendant from the Canadian Pacific Railway Company; and fourth, to recover from the defendants Van Meter and defendant Blades the sum of $973.60 alleged to be due by them to plaintiffs Whella & Co. and the sum of $529.80 alleged to be due by these defendants to Wood & Co.

Rule 170 provides that either party shall be entitled to a jury in actions for slander, libel, false imprisonment, malicious prosecution, seduction, breach of promise of marriage, or which arises out of a tort, wrong, or grievance in which the damages exceed $500, or if the action be for debt or founded upon a contract where the amount claimed or the damages sought to be recovered exceed $1,000, or if the action be for the recovery of real property.

Both the first and fourth objects of the action, as above stated, appear to me to be in effect claims against the defendants Van Meter and defendant Blades founded upon contract, the amounts claimed exceeding in the aggregate $1,000, and, such being the case, the action to that extent is one which those defendants are entitled to have tried by a jury.

The claims to have certain conveyances set aside as fraudulent and that defendant F. C. Van Meter should convey certain land to plaintiff Buyers are not claims for the recovery of lands (see Gledhill v. Hunter, 14 Ch. D. 492),

nor do they otherwise come within the Rule referred to, and if the action was brought in respect of those claims alone, the defendants would not, in my opinion, be entitled to have them tried by jury.

I see no reason why the trial of the issues should not be severed, and those relating to the question of the fraudulent conveyance and the right of the plaintiffs to the conveyance of the land to Buyers tried without a jury, and the other issues by one. If such cannot be done it might follow that a plaintiff having a cause of action which he would not be entitled under the Rule to have tried by a jury, could insist upon its being so tried by joining with it a fictitious claim for a cause of action coming within that Rule.

Order to go setting down action for trial, with a direction that the issues respecting the claims of plaintiffs to have the conveyances mentioned in the statement of claim declared fraudulent and for a direction that defendant F. C. Van Meter shall convey certain lands to plaintiff Buyers shall be tried without a jury, and that the other issues be tried by a jury.

Costs of the application to be costs in the cause.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. OCTOBER 30TH, 1905.

TRIAL.

BREMNER v. WALKER.

Trespass — Destruction of Animal — Proof of Identity — Evidence.

Action to recover $50, the value of a dog which plaintiff alleged was destroyed by defendant.

J. C. F. Bown, Edmonton, and W. A. D. Lees, Fort Saskatchewan, for plaintiff.

J. E. Wallbridge, Edmonton, for defendant.

SCOTT, J.:—At the trial I intimated that, apart from the admissions made by defendant in his examination for discovery, there was not sufficient evidence to establish the fact

that he had killed plaintiff's dog, although it led me to suspect that such may have been the case. I was not favourably impressed by the evidence of defendant or by his demeanour in the witness box, and it appeared to me that a number of witnesses both for plaintiff and defendant were desirous of shielding defendant, and for that reason were unwilling to tell and did not tell all they knew about the circumstances. I reserved judgment in order to consider the effect of the admissions made by defendant in his examination for discovery.

Upon considering them, I am somewhat reluctantly compelled to hold that they are not sufficient to shew with reasonable certainty that the dog which defendant admits having shot at was that of plaintiff. It was urged by counsel for plaintiff that I might accept part only of his statements and reject the remainder, but, even if I were justified in so doing, there is not in any part of his examination anything to lead to the conclusion that the dog he shot at must have been that of plaintiff. It is true that there is evidence that a dog resembling plaintiff's had been seen about the premises where defendant lived, a short time before that, and it is shewn that shortly afterwards a dog, which is proved to be plaintiff's dog, appeared at the farm of defendant's brother-in-law, about a mile and a half from where defendant lived, that it was then wounded, and on the day it appeared there it died, apparently from the effects of the wound, and that defendant's brother-in-law immediately burned the body; but these facts, while undoubtedly tending to throw suspicion upon defendant, fall short of proving with sufficient certainty that the dog he shot at and probably wounded was that of plaintiff.

Judgment for defendant with costs.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. NOVEMBER 30TH, 1905.

TWYFORD v. YORK.

Contract — Construction — Breach—Dependent and Independent Covenants—Indemnity—Evidence—Costs.

Action for damages for the breach by defendant of the following agreement under seal entered into between the parties:

"Memorandum of agreement made this 2nd day of August, 1904, between Charlotte Twyford, of the town of Edmonton, married woman, of the one part, and Archibald York, of the same place, merchant, of the other part.

"Witnesseth that the parties hereto mutually agree with each other as follows, in consideration of their mutual covenants:—

"1. The said Charlotte Twyford agrees that she will execute and deliver to the said Archibald York, or his nominees, a bill of sale of the 250 fanning mills and a transfer of the half interest in Dominion patent No. 61584, and such other instrument as may be necessary to vest in the said York all her interests in the said fanning mills and patent, upon the delivery by the said York to Hugh Twyford at Calgary of 60 head of horses, freight and duty paid, at the rate of $60 per head, the said horses to be approved by the said Hugh Twyford.

"2. The said York agrees to assume from and after the 1st day of October, 1904, the now present liability (with interest) of the said Charlotte Twyford and of Hugh Twyford in respect of a certain note dated the 18th May, 1904, and made by the said Charlotte Twyford to A. York & Sons, which said note became due on 21st July, 1904, and had previously been indorsed by the said A. York & Sons and Hugh A. W. Twyford to the Imperial Bank of Canada, and the said Charlotte Twyford and Hugh Twyford hereby agree to indemnify the said York against all costs or expenses in connection with the said note until the 1st day of October, 1904.

"3. The said Archibald York further agrees to deliver to Hugh Twyford at Calgary, on or before the 30th day of September, 1904, 60 head of horses, freight and duty paid, such horses to be of the average of the horses to be received by the said York from T. D. Bell under a certain agreement dated 2nd March, 1904, provided that one T. D. Bell gives to the said York an order on Sam Hutchison for the delivery to the said York of the said 60 head.

"This agreement is not to affect any rights or remedies now vested in either the said Charlotte Twyford or the said Hugh Twyford; the said Hugh Twyford becomes a party to this agreement and covenants with the other parties thereto to accept 60 horses to be approved of by him at Calgary on or before the 15th September, 1904, and to pay for the same upon delivery at the rate of $60 per head."

Plaintiffs (Charlotte and Hugh Twyford) alleged that at the date of this agreement the liability of plaintiffs in respect of the note mentioned therein was $3,250, and the interest thereon up to October, 1904, was $37.35, and up to the date of the commencement of the action (5th December, 1904), $37.35; that on 26th November, 1904, judgment was entered against them in respect of the same note for $3,325 and costs; that by reason of defendant's refusal to fulfil the agreement plaintiffs had suffered damage, the costs of the action in which judgment was obtained, and for which, together with the sum of $3,323, execution had been issued against them, having been taxed and allowed at $123.60. They claimed the sum of $3,323 together with damages and costs.

The defences to the action were:

1. That plaintiff Charlotte Twyford had, previous to the date of the agreement, purchased from defendant 250 fanning mills and the half interest in the patent mentioned therein, and the note referred to therein was given by her in part payment of same; that she had not executed or delivered to defendant or his nominee a bill of sale of the fanning mills or a transfer of a half interest in the patent, nor was she ready and willing to do so.

2. That defendant was always ready and willing to deliver to plaintiff Hugh Twyford 60 head of horses to be approved by him, but that he (Twyford) was not ready and willing to accept delivery thereof, and before breach of the agreement by defendant he notified defendant to that effect.

3. That T. D. Bell mentioned in the agreement did give defendant an order on Sam Hutchison for the delivery of the horses to defendant, but there were attached to it very onerous conditions which rendered it worthless.

The defendant also counterclaims $350 damages for the breaches by plaintiffs set out in the defence.

At the trial it was admitted by counsel for defendant that the Imperial Bank of Canada recovered judgment against plaintiffs upon the note referred to, on 26th November, 1904, for $3,323 debt and interest, and that on 29th November, 1904, the costs were taxed at $113.50; that the action was commenced on 29th July, 1904; and that executions against goods and lands were issued on or about the date of the taxation of costs.

It was also admitted that on 29th July, 1904, the moneys of plaintiffs in the Bank of Nova Scotia and the Canadian

Bank of Commerce were garnished in that action, and that on 19th December, 1904, the moneys of plaintiff Charlotte Twyford in the last named bank were also garnished in that action.

O. M. Biggar, Edmonton, for plaintiffs.

C. F. Newell, Edmonton, and E. T. Bishop, Edmonton, for defendant.

SCOTT, J.:—It appears from the evidence that prior to the date of the agreement of 2nd August, 1904, plaintiff Charlotte Twyford had purchased from defendant the 250 fanning mills and a half interest in the patent therefor, and that the note mentioned in the agreement was given to her on account of the purchase money thereof. Defendant, who retained the other half interest in said mills and patent, and who acted as manager of the venture for both claims to have delivered some complete mills and parts of other mills sufficient to make up the 250, but plaintiffs assert that only a small portion of the 250 was delivered. Whether there was a complete delivery or not does not appear to me to be material to the issues in the action, but if material the evidence shews that all the mills and parts of mills delivered were sold by the sheriff under the execution issued upon the judgment referred to herein, and that defendant through his agent purchased the same at such sale for $100.

It also appears that prior to the agreement of 2nd August, 1904, plaintiff Hugh Twyford and defendant, together with one Crawford and one Powell, had entered into an agreement with Sam Hutchison referred to in the agreement of 2nd August, 1904, through his agent at Calgary, one T. D. Bell, to purchase from Hutchison 1,000 head of horses in the State of Washington, and had given their joint note to Hutchison for $10,000 as security for completion by them of the purchase, and that prior to 2nd August, 1904, they had paid for and taken delivery of 100 head under their agreement. On 4th August, 1904, Crawford, acting as agent for defendant, entered into an agreement with T. D. Bell at Calgary for the sale to him of the fanning mills and patent referred to in the agreement of 2nd August, 1904, and on that date he received from Bell on account of the purchase an order on Hutchison at Lynd, Washington, for the delivery to defendant of 100 head of horses. Defendant started for Washington some time during the month of September following to obtain

the horses under this order, but upon reaching Calgary he saw Bell, and he then for the first time learned that the horses mentioned in the order formed the whole or part of Bell's commission on the sale of the 1,000 head of horses, and that the order would not be accepted or filled until that purchase had been completed. Being unable to complete such purchase at that time, defendant returned home. It appears that Crawford knew when he obtained the order that it was subject to the condition that the purchase of the 1,000 head must be completed before it would be accepted, but he did not communicate that fact to defendant, and, as I have already stated, the latter did not become aware of it until he reached Calgary.

The evidence leaves it open to doubt why defendant and the others interested with him in the purchase of the 1,000 head were unable to complete it. It appears that Hugh Twyford was depending upon Powell's assistance to enable him to provide his share of the purchase money, but Powell was absent from the country at that time, and he does not appear to have made any provision for putting up his own share. Crawford, who was called as a witness for defendant, states that the latter undertook at the time of the purchase to finance for it, and it appears to have been contemplated by the purchasers that the proceeds of the sales of the first 100 head, which had been paid for, and of future deliveries from time to time, would enable them to provide for the future deliveries.

At all events the order obtained by defendant from Bell, being a conditional one, was not an order within the meaning of the agreement of 2nd August, 1904, but whether his inability to obtain such an order resulted from his own default is a question which I think is unnecessary for me to determine, as plaintiffs are not claiming any damages for defendant's failure to deliver the 60 head of horses.

Defendant states that before he started for Washington to obtain the 60 head, Hugh Twyford notified him on more than one occasion that he could not take delivery of the 60 head, as he was unable to pay for them. The latter denies this and states that he was depending upon Powell to assist him in providing for their payment, and that he so informed defendant, and in this he is corroborated by a son of defendant. Powell was out of the country at that time, but returned shortly afterwards.

It may be that, at the time defendant started for Washington, Twyford was not ready to accept delivery of the horses and pay for them, but he may have been both ready and willing to accept and pay for them when defendant was ready to deliver, and I find that he did not at any time notify defendant that he would not accept delivery. I do not at present see, however, that it is material to so find, as it appears to me that defendant cannot gain anything by shewing a refusal to accept when he was never ready to deliver.

Defendant contends that his covenant to protect plaintiff Charlotte Twyford against her liability on the note is dependent upon his being able to obtain the order for the 100 head of horses, but, in my view, the agreement of 2nd August, 1904, does not support his contention.

Plaintiff Charlotte Twyford has not tendered defendant a re-assignment of the patent mentioned in the agreement of 2nd August, 1904; but that she was always ready and willing to re-assign upon defendant's fulfilling his part of the agreement clearly appears from the evidence. A transfer to him of her share in the fanning mills became unnecessary by reason of the fact that he acquired her interest by purchase at the sheriff's sale.

Defendant contends that plaintiffs must fail because plaintiff Charlotte Twyford did not before action tender a bill of sale of the fanning mills and an assignment of the half interest in the patent.

If the intention of the parties is to be ascertained by the terms of the agreement alone, I am of opinion that the agreement on the part of Charlotte Twyford to give the bill of sale of the fanning mills and assign a half interest in the patent, and the agreement on the part of defendant to deliver the 60 head of horses to Hugh Twyford, are dependent agreements, and that the agreement on the part of defendant to assume the liability of plaintiffs upon the note is in no way dependent upon the performance by Charlotte Twyford of her agreement to transfer the mills and the half interest in the patent, and I am of this opinion notwithstanding the fact that the horses were to be delivered by defendant by 30th September, 1904, and that he was to assume her liability on the note from the following day.

There is nothing to shew that the damages occasioned to defendant by the breach of the agreement on the part of Charlotte Twyford would be at all adequate to compensate the damages she has sustained by the breach of his agreement

to assume her liability on the note: see Leake on Contracts, pp. 565-6. In addition to this, his agreement to assume that liability from 1st October is not, I think, an agreement on his part to relieve her entirely from such liability on that date. I doubt whether she would have a right of action against him for breach of his agreement so long as she remained free from molestation by reason of her liability, as I cannot see that she would have sustained any damage at least until she was threatened with an action upon it.

Evidence as to the dealings between the parties prior to the agreement of 2nd August, 1904, was received, subject to objection taken by plaintiffs' counsel to its admissibility. I now hold that such evidence was admissible: see Wood v. Preston, L. R. 2 Ex. 70, and Humfey v. Daley, 26 L. J. Q. B. 1399. But it should not be received for the purpose of contradicting what appear to me to be the plain terms of the written agreement.

Defendant by his statement of defence raised the question of law that the statement of claim disclosed no cause of action on the part of plaintiff Hugh Twyford. I am of opinion that this objection is well taken. It is true that defendant agrees with Charlotte Twyford that he will assume the liability of both plaintiffs upon the note, but Hugh Twyford is not a party to that agreement. Defendant's agreement as to that is with Charlotte Twyford alone. The agreement therefore confers no right of action upon Hugh Twyford for the breach by defendant: see Ex p. Piercy, L. R. 9 Ch. 33.

I hold that Charlotte Twyford is entitled to judgment against defendant for the amount of the judgment obtained by the Imperial Bank of Canada against plaintiffs, together with all costs which have been taxed or are taxable against her in that action. I have not the necessary material before me to enable me to ascertain the amount. The evidence shews that moneys were realized by the sheriff under execution by the sale of the fanning mills, and these, less the sheriff's fees, poundage, and expenses, should be credited upon the judgment.

There will, therefore, be a reference to the clerk to ascertain the amount to which the plaintiff Charlotte Twyford is entitled.

Plaintiff Charlotte Twyford to have the costs of the action, less any costs occasioned by Hugh Twyford being

added as plaintiff. Defendant to be entitled to set off any extra costs occasioned by Hugh Twyford being so added.

I give judgment for plaintiff Charlotte Twyford upon defendant's counterclaim.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. NOVEMBER 3RD, 1905.

TRIAL.

COCKSHUTT PLOW CO. v. MILLS.

Sale of Goods—Action for Price—Written Warranty—Inconsistent Undertaking of Agent for Vendors — Return of Goods—Condition Precedent—Notice — Waiver—Implied Warranty—Counterclaim—Defects in Goods—Costs.

Action upon two lien notes given for the price of a disc drill sold by the plaintiffs to defendant.

J. T. Brown, Moosomin, for plaintiffs.

E. L. Elwood, Moosomin, for defendant.

WETMORE. J.:—The notes were dated on 28th March, 1904, one for $65, payable on 1st November, 1904, and the other for $75, payable on 1st November, 1905. Each of these notes contained a clause that if default in payment was made, or the payees should consider the note insecure, they had full power to declare it and all other notes made by defendant in plaintiffs' favour at any time due and payable forthwith. The statement of claim alleges that defendant having made default in payment of the note for $65, they declared the other note due and payable forthwith. Defendant denies that this was done. I find as a matter of fact that Mr. Grimmett, the advocate for plaintiffs, did declare the note for $75 due. No contention was raised that it was not in his power to do so, and I find that issue in favour of plaintiffs.

Some time in March, 1904, defendant by order in writing requested plaintiffs to ship to Arcola "one 17 double disc drill," for which he agreed to pay $140. The order specified that it would be subject to the printed warranty and agreement on the back of the order, reading as follows: "It is understood that the implement mentioned in this order is warranted to be well made, of good material, and capable of doing good work when properly adjusted and managed. Should the implement not work well, the purchaser must notify the agent from whom he ordered it, and also the Cockshutt Plow Co., Ltd., of Winnipeg, Manitoba, stating wherein it fails, and allow them reasonable time to get it and remedy the defects (if any), the purchaser rendering necessary and friendly assistance, furnishing a suitable team, driver, etc., when, if it cannot be made to do good work, he shall immediately return it to the place where received, free of charges of any kind, in as good condition as when received, and a new implement will be furnished in its place, or the notes or money given therefor will be refunded."

The Moose Mountain Lumber and Hardware Co. were the agents of plaintiffs at Arcola, and one Watt was the agent at Arcola of the Moose Mountain Lumber and Hardware Co., and the order in question was taken by him from defendant. These drills were kept on hand by the last mentioned company, and they did not have to send to Winnipeg, where plaintiffs' headquarters for the west were situated, for the drill ordered. Some few days after the order was given, defendant came and got his drill and was requested to sign the notes forming the subject matter of this suit. He declined to do so before he had a trial of the machine, and he was informed that plaintiffs' agents were not in the habit of sending a machine out that way, and thereupon Watt stated that "if the seeder" (meaning the disc drill) "did not suit the defendant he could return it and get his notes;" and thereupon defendant signed the notes. The evidence does not establish that there was any agreement on the part of plaintiffs or any person on their behalf to set up the seeder on defendant's farm or anywhere else. The drill did not work satisfactorily, and defendant notified Watt to that effect. An expert was sent out, and he did not make it work any better. It was then suggested, and the suggestion was acceded to by defendant, that if shoes were changed for the discs the machine might work satisfactorily, and plaintiffs' agents agreed to

send for these shoes, representing that they would have them there in a couple of days. These shoes were to have come from Winnipeg, but they did not arrive, and about a week after the arrangement to have the shoes exchanged for the discs was made, defendant sent the drill into Arcola, and it was left behind the warehouse of the Moose Mountain Lumber and Hardware Co., but not on their grounds. Neither the last mentioned company nor any person on behalf of plaintiffs ever accepted redelivery of this seeder. It is contended that the statement made by Watt to defendant at the time the notes were signed amounted to a warranty, and that, the seeder not giving satisfaction, defendant was entitled to return it, and that having done so it was an answer to the action brought on the notes. I may add here that if defendant was entitled to return the machine he did return it. I am not satisfied that the statement made by Watt could, under any circumstances, be construed to be a warranty. I am inclined to think that it was merely a re-echoing of what Watt considered to be the effect of the warranty indorsed on the order. But, assuming that it could be construed into a warranty on the part of Watt, I am of opinion that it would have no binding effect upon plaintiffs, because it is inconsistent with the warranty indorsed upon the order. There are cases where it has been held that where an agreement in writing and an oral warranty is given, which may be construed as collateral to the written agreement, the warranty would be binding. I refer to such cases as Morgan v. Griffith, L. R. 6 Ex. 70, and De Lassalle v. Guildford, [1901] 2 K. B 215. In these cases however the parol warranties were not inconsistent with the written agreement. In this case it is quite inconsistent, and therefore upon a well known principle it cannot be held to alter the written agreement. The warranty indorsed on the order provided that if the implement did not work well the purchaser was to notify the agent from whom he ordered it, and also the Cockshutt Plow Co., in Winnipeg, stating where it failed and allowing them reasonable time to get it and remedy the defects (if any), and it was only after that was done and the defects could not be remedied, that defendant would be in a position to return the implement and receive back his notes. Defendant did not notify the Cockshutt Plow Co., at Winnipeg, that the machine did not work satisfactorily, and therefore has not complied with the precedent condition which would entitle him

to return it. That disposes of defendant's defence, and there must be judgment for plaintiffs on the cause of action.

An application was made at the conclusion of the trial to amend the statement of defence by setting up that the drill was not reasonably satisfactory for the purpose for which it was purchased. That amendment cannot be allowed, because that would be setting up an implied warranty that it was satisfactory for the purpose for which it was sold. That is involved, however, in the express warranty indorsed on the order, and where there is such an express warranty an implied one cannot be set up to the same effect, or, in other words, defendant cannot be allowed to set up an implied warranty for the purpose of getting rid of the provisions of the express warranty to the same effect contained in his agreement.

It was contended that there was a waiver of the condition with respect to notifying the company at Winnipeg, by reason of the agent having sent an expert out to examine the drill, and my judgment in John Abell Co. v. Long, 1 W. L. R. 24, was referred to in connection with that. In that case, however, defendant had notified both the agent from whom he purchased the machine and the company, and the only notice taken of the notification was the conduct of the agent, who then did an act which I held to be a waiver of the clause providing for sending an expert out. There must be some object in giving the company notice, as well as the agent. In the Abell case the company having been notified did no act whatever. The agent was the only person who acted in that case. In this case the company have not been given an opportunity to act, because no notice was given to them as provided for by the agreement; I feel I must assume that in view of the language of the agreement in question.

It follows that the counterclaim arising from the unsatisfactory character of the machine must fail also. Defendant took the machine practically on trial, and subject to the other conditions contained in his agreement. It was incumbent on him to carry out the conditions of that agreement on his part, and not having done so he must fail.

There will be judgment therefore for plaintiffs on the claim for $150.25 and costs. And there will be judgment for plaintiffs on the counterclaim also with costs.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. NOVEMBER 3RD, 1905.

TRIAL.

SNOW v. BENSON.

Company—Directors—Action by Judgment Creditor against —Payment of Dividend when Company Insolvent—Preferential Payment of Defendants' Claims against Company —Judgment for Damages—Companies Ordinance, sec. 65.

Plaintiff alleged that he was a judgment creditor of the Wolseley Milling Company, Limited, a company incorporated under the provisions of the Ordinances of the North-West Territories, of which defendants were the managing directors and holders of all the shares; that defendants declared and paid a large dividend while plaintiff was so a creditor of the company, whereby they rendered the company insolvent and impaired the capital stock thereof; and he claimed payment by defendants of the amount of his judgment.

E. A. C. McLorg, Moosomin, for plaintiff.

E. L. Elwood, Moosomin, for defendant McPhail.

No one for the other defendants.

WETMORE, J.:—It is set up that the liability of the defendants arose by virtue of sec. 65 of the Companies Ordinance, R. O. ch. 61, which was in force at the time of the transactions in question. In order to make defendants liable to plaintiff by virtue of that section, defendants must be brought within the provisions of it, and, to begin with, it must be proved that they declared and paid a dividend when the company was insolvent, or that they declared a dividend the payment of which rendered the company insolvent or impaired the capital stock thereof. The evidence failed to establish that these directors declared any dividend at all. As a matter of fact defendant McPhail was the manager and

secretary-treasurer of the company, Benson was the miller, and Thomson the engineer, and they were occupying these positions for pay at fixed salaries. These defendants appropriated the moneys in question to themselves. The amount appropriated to McPhail did not exceed the amount of the company's indebtedness to him for wages and allowances made by him to the company. There was no indebtedness from the company to Benson or Thomson. There is no doubt that these defendants applied nearly the whole of the available assets of the company to themselves, leaving the rest of the creditors of the company without anything worth speaking of to be applied towards their claims. It is quite possible that if an action had been brought against them by the company to recover the amount so appropriated, or by some person for the purpose of winding up the affairs of the company, or if proceedings had been taken under the Winding-up Act, they might be made to disgorge, but it is not open to plaintiff to institute proceedings against them under this sec. 65 of the Ordinance in question, because, as I understand the expression, they have not declared a dividend.

A question of law was also raised and argued before me. In the 4th paragraph of his statement of defence defendant McPhail set up that the judgment referred to in the statement of claim was not recovered with respect to a debt, but that it was recovered with respect to a claim for damages. It was set up on the part of plaintiff that this afforded no answer in law to the action. I am of opinion that it does. At the time the alleged dividend was paid the judgment in question had not been recovered, and if, as a matter of fact, the claim was one for damages and not of debt, sec. 65 would not apply, because a claim for damages is not a debt, and therefore defendant McPhail is entitled to judgment on the question of law raised.

Defendant McPhail was the only one who defended the action.

There will therefore be judgment in favour of defendant McPhail, with costs of the action, including the costs of and incidental to the argument of the question of law before stated.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. NOVEMBER 9TH, 1905.

TRIAL.

SHOREY v. VAN METER.

Sale of Goods—Action for Price—Authority of Agent of Purchaser—Delivery—Acceptance—Sale of Business by Defendant—Evidence—Copies of Orders for Goods—Freight Charges.

Plaintiffs sued for $562.60, the price of goods sold and delivered by them to the defendant, for $300.85, the amount of a promissory note made by Van Meter & Blades and indorsed by defendant, and for $12, freight paid by plaintiffs for defendant.

The defendant by his defence denied that he purchased or received the goods from plaintiffs. He admitted his liability upon the promissory note, but alleged that, before action, he tendered plaintiffs the amount thereof with interest, and he brought into Court $306.75, which he said was sufficient to satisfy the same.

C. F. Newell, Edmonton, for plaintiffs.

F. C. Jamieson, Strathcona, and J. W. Tipton, Strathcona, for defendant.

SCOTT, J.:—At the trial defendant admitted that he had not tendered plaintiffs the amount due upon the promissory note.

The sole question therefore to be determined is whether defendant purchased and received the goods from plaintiffs.

Defendant was a merchant carrying on business at Millet. In March, 1903, plaintiffs' traveller, one Riley, went to Millet and obtained from one Blades, a son-in-law of defendant, who was the clerk in charge of his store there, an order for goods to the amount of $534.75 to be shipped to defendant at Millet.

In September of the same year Riley returned to Millet, and obtained from Blades an order for delivery to defendant

there of further goods to the amount of $324.50. At the trial I was in doubt whether there was sufficient evidence to shew that these goods were delivered to defendant, as it appeared that they were to be shipped by rail to Millet, where at that time there was no railway agent to receive them; that in consequence the freight on goods to be delivered there required to be prepaid, and delivery was made merely by unloading the goods at Millet siding, where they were at the consignee's risk, no receipt being taken by the railway company. Upon reviewing the evidence, however, I find that there is sufficient evidence to establish the delivery at the store. Riley states that he was there upon one occasion after taking the second order, and that he then saw there goods which he recognized as those included in each of the orders, and Blades states that the goods ordered by him were received at the store.

I find upon the evidence that Blades, when he gave the first order to Riley, was acting as agent for defendant and was authorized by him to give it. I find this notwithstanding the denials of both defendant and Blades that the latter was so authorized.

Defendant states that he sold out the business to Blades in the latter part of February or beginning of March, 1903, and Blades states that immediately afterwards he took defendant's son into partnership, and that the business was thereafter carried on under the firm name of Van Meter & Blades. I entertain some doubt as to whether any bona fide sale of the business was made at that time, as the statements of both defendant and Blades as to the time and the manner in which the sale was carried out leads to the suspicion that the setting up of such a sale was an afterthought, and that it was conceived for the purpose of relieving defendant from liability for goods ordered by him.

I find that if any sale of the business took place it was effected after the first order was given to plaintiffs. It is unnecessary for me to determine whether a sale was made prior to the second order, as, if it was, plaintiffs had no notice of it, and they were therefore justified in treating the second order like the first as one from defendant. Defendant admits that he gave no notice of the sale to those from whom he had been purchasing goods, and there is the significant fact that, while the two orders were for delivery to defendant, a third order which Riley obtained from Blades in 1904, was for delivery to the firm of Van Meter & Blades.

At the trial plaintiffs' counsel, in addition to putting in the original orders taken by Riley, tendered as evidence copies thereof which were made by him and forwarded to plaintiffs shortly after he received the orders. Defendant's counsel objected to their receipt, on the ground that being merely copies of the original they were not admissible. I received them subject to the objection. I now hold that they are not admissible as evidence. They might however be used by Riley and were used by him to refresh his memory as to the dates upon which he received the orders, as the copies bore the dates of March and September, while the originals bore no date.

Although it follows from what I have already stated that plaintiffs must have paid the freight charges upon the goods, there is no evidence as to what those charges amounted to. I will therefore have to disallow the amount claimed for freight.

I give judgment for plaintiffs for $891.80 and costs. The moneys paid into Court by defendant to be paid out to plaintiffs on account of their judgment.

MANITOBA.

MATHERS, J. NOVEMBER 20TH, 1905.

TRIAL.

SLOUSKI v. HOPP.

Mistake—Agreement for Purchase of Land—Mistake of Purchaser as to Quantity, not Known to Vendor—Hardship Amounting to Injustice—Rescission—Election to Affirm Agreement after Discovery of Mistake — Fraud — Payment of Commission to Agent.

Defendants Hopp and May were owners of a lot on Pritchard avenue, Winnipeg, numbered 17 on a registered plan. Planitz & Friedrich, real estate agents, on behalf of defendants, entered into negotiations with plaintiff to sell him lot 17, and he agreed to purchase the lot for $900, and signed an agreement and paid $300. He thought he was buying two

lots, 17 and 18, and notified Hopp and May that the written agreement did not embody the terms of the arrangement he had made, and demanded back his $300. Hopp and May never had any title to lot 18. Plaintiff asked that the agreement be cancelled, as not binding upon him, and for a lien on lot 17 for his $300 and interest.

C. W. Bradshaw, for plaintiff.

E. L. Taylor and S. R. Laidlaw, for defendants.

MATHERS, J.:—I am satisfied, from the evidence, that the plaintiff entered into the agreement under a mistaken belief as to the quantity of land he was to get. The cottage was situate on the second lot from the corner, and the corner lot was vacant.

The plaintiff believed that the land occupied by the cottage extended to the corner, and he did not discover his mistake until after the agreement was signed and his money paid. In arriving at this conclusion I am not so much influenced by the evidence of plaintiff as I am by his conduct. On the way home after signing the agreement, it transpired in conversation with defendant Hopp that the land he had just bought did not include the corner lot. Upon hearing this plaintiff immediately demanded a return of his money. The next day he made a similar demand upon the defendants' agents and upon the solicitor by whom the agreement was prepared.

I am, however, equally well satisfied that neither the defendants nor any agent of theirs knew that plaintiff was making a mistake as to the quantity of land he was buying, or in any way contributed to that mistake. In my view the mistake was entirely self-imposed. The defendants did not own the corner lot, and the agents had not that lot listed for sale.

I do not believe that the agent Planitz told plaintiff there were two lots, or that the land had 66 feet frontage. The plaintiff knew that city lots were distinguished and described by numbers. He could so identify them. He first signed a memorandum of the purchase in which the land was designated as lot 17. This memorandum was read over to him in his own language by Planitz before he signed it. The formal

agreement was again read to him by the solicitor who prepared it, who drew his attention especially to the description of the land, and plaintiff said it was right. It is inconceivable that plaintiff should hear the land described so frequently as lot 17 alone, and have his attention particularly drawn to it, and yet be of opinion that he was buying lots 17 and 18. The plaintiff is a Polander, but he has lived for 6 years in English-speaking communities, and I am satisfied knows enough English to detect at once such an important omission as one of the lots he supposed he was buying from the description of the land in the agreements. The mistake of one party to an agreement, where the mistake was not known to the other party, and where there was nothing in the language or conduct of the other party which led to or contributed to the mistake, does not give a right of rescission unless a hardship amounting to injustice would be inflicted upon the party by holding him to his bargain, and it would be unreasonable to do so: Miller v. Dahl, 9 Man. L. R. 444.

The principal case on this question is Tamplin v. James, 15 Ch. D. 215. That was an action for specific performance, which was resisted by the defendant upon the ground of mistake. The property sold consisted of an inn and saddler's shop referred to as "Nos. 454 and 455 on the Tithe map," which map was at the place of sale for inspection. At the back of the property were two pieces of garden ground, not belonging to the vendor, one of which had for many years been occupied with the inn and the other with the saddler's shop. The purchaser knew that these gardens were occupied with the inn and saddler's shop. He did not look at the plan, and bought in the belief that he was buying the whole property. The purchaser refused to go on with the purchase, and the vendor brought an action against him and recovered judgment for the specific performance of the agreement notwithstanding the mistake. In dismissing an appeal by the defendant, James, L.J., says: "Perhaps some of the cases on this subject go too far, but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff, have been cases where hardship amounting to injustice would have been inflicted upon him by holding him to his bargain and it was unreasonable to hold him to it." That case was followed by Goddard v. Jeffries, 30 W. R. 269, and Miller v. Dahl, 9

Man. L. R. 444, and more recently by Van Praagle v. Everidge, [1902] 2 Ch. 266. There the defendant bid at an auction sale for one lot, believing that he was bidding for another, but the Court, at the trial, held that his mistake did not relieve him. The case was afterwards reversed in the Court of Appeal, [1903] 1 Ch. 434, but solely upon the ground that there was no memorandum of the bargain to satisfy the Statute of Frauds.

I do not think, in this case, that any hardship amounting to injustice will be inflicted upon plaintiff by refusing to give him relief against his mistake.

I am satisfied that the price he has agreed to pay is not more than the fair value of the one lot and the cottage. Plaintiff cannot, therefore, get relief on the ground of mistake.

There is a further ground that, I think, is equally fatal to plaintiff.

On the evening of 11th April he had notice of his mistake. He subsequently paid two of the monthly instalments of his purchase money. On 25th April he went into occupation of the cottage, and has continued to occupy it ever since. These are unequivocal acts consistent only with an intention to carry out the contract. When a party to a contract discovers facts entitling him to rescission, he must elect either to carry it out, or to rescind it; and, once having made his election, it is irrevocable: Campbell v. Flemming, 1 A. & E. 40; Doll v. Howard, 11 Man. L. R. 577.

By making payments under the agreement and by taking possession of the property as owner and occupying it as such, plaintiff has waived his right to take advantage of his mistake, even if he were on that ground entitled to relief.

It was argued that he has continuously demanded a return of his money, but I do not think that is sufficient. His conduct as well as his language must be consistent with an intention to rescind.

It was further contended that one Jarrizki, with whom the defendants' agents divided the commission on the sale, without the knowledge of plaintiff, was plaintiff's confidential agent, and that this constituted a fraud upon plaintiff,

entitling him to have the agreement declared void; and Smith v. Murray, 14 Man. L. R. 125, was cited in support of this contention.

I cannot find that Jarrizki was the agent of plaintiff, and this sufficiently distinguishes this case from Smith v. Murray. The plaintiff met Jarrizki a few days before the sale for the first time, and asked him if he knew of any houses for sale. Jarrizki, who had formerly been employed in a real estate office, went with plaintiff to the office of his late employers, and they having nothing to suit, he brought him to the office of the defendants' agents, where the agreement was made. There was nothing in the relationship of Jarrizki to the plaintiff which rendered it improper for the defendants' agents to divide their commission with him.

The action must be dismissed with costs.

YUKON TERRITORY.

CRAIG, J. OCTOBER 21ST, 1905.

CHAMBERS.

MUNROE v. MORRISON.

Appeal to Court en Banc—Extension of Time for—Mistake of Solicitor—Long Delay—Special Circumstances.

Motion by defendant Hebb for leave to appeal or to extend the time for appealing under Rule 512 of the Yukon Ordinances, which Rule provides that "the Court or Judge may, either before or after the expiration of the period, enlarge the time for giving notice."

Henry Bleecker, for defendant Hebb.

F. L. Gwillim, for plaintiff.

CRAIG, J.:—To understand the full import of this motion, one must consider the litigation leading up to it.

The action was tried in 1901, and on 25th July of that year judgment was given on the facts. Some questions of law were raised, particularly the question of a partnership or whether a partnership or not existed between McDonald and Hebb and the other defendants; and also the question of res adjudicata was under consideration, and upon the law judgment was delivered on 25th January, 1902, and formally entered on 31st January. On 13th February the defendant McDonald alone applied for time to appeal. On 20th February of the same year execution was issued against all parties. On 3rd March McDonald got the time to appeal extended for one month, and execution was set aside as against him. On 28th March defendant McDonald applied for further time to appeal. On 1st April there was an ex parte application for the payment of the money out, but the Judge directed notice to be served on all parties. This notice was served upon all the defendants, and an order was made for payment out to plaintiff's solicitor of the money in Court. On 15th April an order was made staying execution on defendant McDonald paying costs. On 1st May another order was made granting time to appeal to defendant McDonald. On 13th June notice of appeal was served for appeal to the Supreme Court of British Columbia, then the court of appeal for the Yukon Territory. On 27th September the appeal book was filed. On 19th November defendant McDonald served notice of motion for leave to appeal to the Supreme Court of Canada. On 1st December that motion was partly argued. On 26th December another notice of motion was served for leave to appeal. On 5th January, 1903, leave to appeal to the Supreme Court of Canada was granted. On 6th December it was arranged that the appeal should be heard in the Yukon Territory en banc. I may mention that the reason for all these various motions was owing to confusion here as to the jurisdiction of the court of appeal. Between the time of the judgment on the law in this case and the time for the final hearing of the appeal, the Dominion Parliament changed the court of appeal from the Yukon, abolishing appeal to the Supreme Court of British Columbia, and constituting a Court en banc here. Owing to the distance from Ottawa and the season of the year no one here had obtained a copy of that statute, and there was great doubt as to what the effect of it was and how far it affected pending actions. The statute was finally received, and it was

concluded that the appeal should be to the Court en banc here, and that appeal was finally taken. Between January and April various proceedings were taken and costs taxed against McDonald, and the appeal book was settled on 10th April. The appeal was argued on 23rd and 24th April, and on 18th July the appeal of defendant McDonald was allowed. On 1st August the Court en banc judgment was settled. Nothing further was done until 8th May, 1905, when the judgment entered upon the appeal was amended, upon the ground that it did not correctly express the judgment of the Court. The judgment was in this form, that the appeal was allowed with costs payable by the respondents, dismissing the action in the Territorial Court. The amendment was that the appeal was allowed dismissing the action as against said Alexander McDonald, he being the only one who appealed. From that order of the Court en banc amending this judgment the defendant Hebb appealed, upon the ground that no notice was served upon him of any application to amend or vary that judgment; that the judgment as amended was not in accordance with the judgment of the Court; that the judgment before the order amending the same was in accordance with the reasons for judgment expressed by the Court. The Court en banc dismissed that application and confirmed the formal order to amend the judgment, making it a dismissal of the action as against McDonald only. Neither Morrison, Hebb, nor Jose ever appealed or took any action in the matter until now.

The action was brought by Munroe, who claimed for himself and as assignee of a number of workmen who performed work upon mining claims owned by the defendants in common. There was never any doubt as to the work having been performed upon those claims. The defendants appeared severally and severed in their defence, appearing by different solicitors and had different counsel at the trial, raising various defences, McDonald raising the defence that he was not a partner of his co-defendants and never authorized the work. There was also the question of res adjudicata, which arose, as the defendants alleged, because these same actions for wages had been tried before the police inspector, acting as a justice of the peace, and judgment had been pronounced upon them. Upon the hearing of the appeal before the Court en banc a new question arose, not raised upon the pleadings

and not raised in the argument before the Court of first instance, and not raised upon the appeal and in the reasons for appeal, but argued before the Court en banc, the question being that Munroe was not entitled to sue because under our Ordinance, ch. 37, respecting choses in action, he was not the "possessor of the whole and entire beneficial interest" in the choses in action, it being in evidence that he was simply the assignee by assignment in writing, for a nominal consideration, and suing on behalf of himself and the other wage-earners. Upon this point Mr. Justice Macaulay decided to dismiss the action and to sustain the appeal. Mr. Justice Dugas, while not deciding very strongly upon that point, took other grounds in regard to the defendant McDonald, who was the only appellant, and decided both that he was not a partner of his co-defendants and that the question was res adjudicata and on other grounds.

It is now contended that the appeal of the defendant McDonald having been successful would have the effect of dismissing the action as against all the other defendants who did not appeal; that Hebb was so advised by his solicitor; that the formal judgment of the Court after the judgments in appeal confirms that view; and that in any case the Court en banc having decided the principle of law which would have had the effect of dismissing the action as against Hebb if he had taken his proper appeal, he should now be allowed in to appeal upon that ground.

As to the facts there is no evidence that defendant Hebb searched for the judgment of this Court after the appeal judgment was pronounced to see what its effect was. Execution was standing against him, and if he had that impression he should have taken action to stay or set aside the execution. He did nothing until to-day.

As to the merits of this motion I am entirely against the applicant. . . .

[Reference to In re Manchester Economic Building Society, 24 Ch. D. 496; Collins v. Vestry of Paddington, 5 Q. B. D. 368; Wildman v. Lade, 4 DeG. & J. 401; In re Helsby, [1894] 1 Q. B. 742; Craig v. Phillips, 7 Ch. D. 249.]

In the case before me the party applying really comes before the Court asking for an indulgence and for the sympathy of the Court because it turns out that if he had properly appealed and taken the point upon which the successful appellant succeeded he would have had the judgment

against him reversed, and this application he makes 3 years after the judgment was given, nearly 4 years. I cannot see any difference in principle between parties in different actions and parties in the same action applying for like relief. If a suitor in an independent action learns that the Court of Appeal has given a judgment in favour of an appellant which would have relieved him from a judgment if he had in his own case taken an appeal, in what better position is such a person, or in what worse position is he than a co-defendant who has severed in his defence and who has not taken an appeal? For how long a time will the indulgence be allowed? When will the suitor reach finality in his judgment, or must he be forever in dread lest some litigant raise a point of law in the Court above and his judgment be disturbed years afterwards? Is the right to appeal to be limited to a month or a year or 5 years? If 5 years, why not 10 years? The expressions of the Court in Craig v. Phillips are very much in point upon that view of the case. Thesiger, L.J., said: "I am of opinion that this Court ought not lightly to interfere with the time fixed for bringing appeals, and ought to require very special circumstances to be shewn before exercising its judicial discretion to enlarge the time." Upon this branch of the case I think that the circumstances of the case ought to have very great weight in deciding whether the application should be allowed ex debito justitiæ or not. The point on which the Court of Appeal overruled the judgment of first instance was in reality a technical point. It was as to the effect of a statute. There was no pretence that upon the merits the judgment was not good, the objection being merely that upon the law as affected by that statute it was not a good judgment. To-day in this Territory such an action could be brought because the statute has been amended. The defendant Hebb, the present applicant, was fully aware of a judgment existing against him, because execution was issued. He has allowed a long time to elapse, an unreasonably long time. If that judgment had been set aside promptly at the time, the various parties interested who assigned their claims to the plaintiff Munroe could have brought independent actions against the defendants and recovered, in all probability. The witnesses are scattered to-day who could prove the claims. The plaintiff says he was content with the judgment which was obtained against the 3 defendants, although he had lost his judgment against the appellant McDonald. If he had appealed upon the question

of the interpretation of the statute he would still have had the right to appeal to the Supreme Court of Canada, but being content with the judgment against the three defendants he did not take that appeal, and I think that the lapse of time is sufficient of itself to warrant me in refusing the application. . . .

[Reference to Gilbert v. Jarvis, 2 Ch. Ch. 259; Esdaile v. Payne, 40 Ch. D. 520; Highton v. Trahern, 48 L. J. Ex. 167; In re Blythe and Young, 13 Ch. D. 416; Trask v. Pellent, 3 B. C. R. 1; Gething v. Atkins, ib. 138; Tollemache v. Hobson, ib. 223, Reinhard v. McClusky, ib. 226.]

On the whole application I think there are no special circumstances shewn. The mistake of the solicitor in advising his client that the appeal of the one defendant would enure to his benefit is not such a mistake or special circumstance as would justify me in extending the time, especially after this great lapse. I do not wish to lay down the principle that time will never be extended owing to such a mistake, but I do say that in this case the special circumstances do not exist to warrant me in granting the leave applied for.

The motion will be dismissed with costs.

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MANITOBA.

RICHARDS, J. DECEMBER 4TH, 1905.

TRIAL.

KEDDY v. MORDEN.

Fraudulent Conveyance — Husband and Wife — Judgment against Husband — Enforcement against Lands Standing in Name of Wife—Trust—Registration of Certificate of County Court Judgment — Voluntary Conveyance—13 Eliz. ch. 5—Statute of Limitations—Claim Arising after Fraudulent Conveyance—Costs.

Action to enforce a lien upon land and for a declaration of a trust, etc.

S. H. McKay, for plaintiff.

G. St. John Hallen, for defendants.

RICHARDS, J.:—The defendants are husband and wife. On 3rd May, 1892, the husband and his father signed a document promising to pay plaintiff $220 on 1st December, 1892. It is in the form usually called a lien note.

The husband defendant held a homestead entry for the south-east quarter of 12-6-29 west of the principal meridian. He received a certificate of recommendation for patent dated 30th July, 1895, and countersigned by the Commissioner of Dominion Lands, on 8th August, 1895.

On 9th September, 1895, the husband was indebted to plaintiff on the above lien note, and owed other debts. He

had no assets other than the above quarter section of land, and without that land, and perhaps with it, as values of land then stood, was insolvent and unable to meet his debts.

On 9th September, 1895, the husband executed to the wife a quit claim deed of the land. She then applied to the Department of the Interior and procured the patent to be issued in her favour. She still holds the land, but she and her husband ceased to reside on it or cultivate it before the present action began.

It was alleged that the transfer to the wife and the procuring the patent to her were done in pursuance of a scheme by the husband and wife to defeat, hinder, and delay the husband's creditors and to deprive them of recourse against the land.

On 3rd December, 1898, plaintiff sued the husband in the County Court at Brandon on the lien note, and on 19th July, 1899, he recovered judgment for $420.17 debt and costs. That judgment was transferred to the County Court of Hartney, a certificate of the judgment was issued from the last named Court, and registered in the registry office for the district in which the land lies.

On 8th March, 1905, plaintiff commenced this action, in which he alleged that the wife never had any beneficial interest in the lands, but held them merely as a trustee for the husband. The relief asked is that the wife be declared a bare trustee for the husband, and that the lands be declared subject to sale to satisfy plaintiff's claim and be sold for that purpose. The prayer asks also for further and other relief.

I do not think there is any trust as between the husband and the wife, or that he has, as between her and him, any interest in the land. He intended to give it to her absolutely. It was a conveyance without actual consideration; but though voluntary it was absolute as between the parties to it. I do not think the land became bound in any way by the registration of the certificate of judgment. The registration of a certificate of a County Court judgment binds all interest or estate of defendant in lands within the registration district, the same as though defendant had in writing under his hand and seal charged those lands with the amount of the judgment. But, as the transfer of the land to the wife was binding as against the husband, he could not thereafter as against her charge the lands.

The conveyance to the wife being voluntary, and there being a prayer for general relief, I have considered whether

by allowing plaintiff to amend his pleadings and attack the conveyance under the statute 13 Eliz. ch. 5, relief could be given.

To so attack successfully, the plaintiff would have to shew that he did so in respect of a debt due by the husband at the time of the fraudulent conveyance to the wife, or that at the time of his bringing this action there was still due and unpaid some other debt that the husband had owed at the time of such transfer, and the holder of such other debt could attack the conveyance under it.

In Struthers v. Glennie, 14 O. R. 726, it was held that a voluntary conveyance cannot be successfully attacked under a debt due at the time of the conveyance, but barred by lapse of time before the action to attack was begun. I take the law to be the same, whether the debt sought to be realized on, though antecedent to the conveyance, is so barred, or the antecedent debt under which a subsequent creditor seeks to attack is so barred.

It will be observed that the instrument sued on in the County Court is payable "on or before the 1st day of December, 1892." It contains provisions usual in a so-called lien note, as a result of which instruments, otherwise notes in form, were held in Bank of Hamilton v. Gillies, 12 Man. L. R. 495, not to be negotiable instruments. I take the effect of that decision to be that they were not promissory notes. If the instrument now in question was not a promissory note, it became due and exigible on 1st December, 1892, and not on 4th December, 1892, as there would be no days of grace. The remedy on it by action would therefore be barred by the Statute of Limitations on the last day of November, 1898.

The County Court action was not brought until the third day thereafter. During those three days no action could have been successfully brought by plaintiff under 13 Eliz. to attack the conveyance to the wife, as she would have the defence under the law as laid down in effect in Struthers v. Glennie, that the debt sought to be enforced was barred. She was not a party to the County Court action. She cannot, therefore, be held to have lost her then vested right to avail herself of the Statute of Limitations merely because her husband chose to not plead it in the County Court. The wife has not pleaded that statute in this action. I am not sure that she would need to plead it, even if plaintiff had laid his action under 13 Eliz. But she clearly would have a right to

set it up in reply to the amendments that the plaintiff would have to make to bring his action in that way.

It seems to me that as against the wife plaintiff's claim must be taken as still barred by the Statute of Limitations, or, at the utmost, to have come into existence only on the recovery of the County Court judgment. In the latter case he could attack only as a creditor whose claim arose only after the fraudulent conveyance. To do so he must shew some other outstanding debt under which its holder could, at the time of the commencement of this action, have successfully attacked the conveyance.

As stated in Struthers v. Glennie, the rule allowing the subsequent creditor to attack where a prior debt still exists is, that if a prior creditor set aside the conveyance "a subsequent creditor would be entitled to participate pro rata, so that he has an equity to participate, and may bring an action to enforce that equity."

It is shewn that, at the time of the fraudulent conveyance, the husband was indebted to others and has not yet paid some of his then other debts. But the onus of shewing that an action to attack a conveyance would lie under one of these debts is on plaintiff. He has not done so. The presumption is that they are also barred by the Statute of Limitations. Some of them were too small to found an action on in equity. There will be judgment dismissing the action. But because of the demeanour of the husband while giving evidence at the trial and of what seemed to me the wilfully untrue answers of both defendants in their examinations for discovery as to the conveyance having been made for value, there will be no costs to either party.

MANITOBA.

DECEMBER 6TH, 1905.

FULL COURT.

REX v. BARRÉ.

Criminal Law — Conviction under Criminal Code, sec. 177 (b)—Omission of "Wilfully" in Conviction and Commitment — Habeas Corpus — Amended Conviction and Commitment Substituted on Return — Refusal to Discharge Prisoner—Appeal to Full Court.

Application for a writ of habeas corpus.

L. Laurier, for the prisoner.

G. Patterson, for the Crown.

MATHERS, J.:—The prisoner was convicted under sec. 177 (b) of the Code and sentenced to three months' imprisonment. Neither the conviction nor the warrant of commitment stated that the offence was committed "wilfully." I think that omission renders both the conviction and commitment bad. Upon motion for habeas corpus to discharge the prisoner on this ground it appeared that after the notice of motion was served a new conviction and commitment, in which the defect was cured, were substituted for the defective one.

It was objected on behalf of the prisoner that this could not be done, as the defect was not one of form but of substance, and was, therefore, incurable. In support of this contention The King v. Hayes, 6 Can. Crim. Cas. 357, was cited. In that case the question of whether or not a new conviction could be substituted for the defective one was not before the Court.

All that was there decided was that the defect in the conviction, being one of substance, did not come within sec. 889 of the Code, which applies only to an "irregularity, informality, or insufficiency" therein. That case therefore does not support the prisoner's contention.

The right to substitute a good for a bad conviction or commitment, after a motion has been made for a habeas corpus, has long been recognized and acted upon: Clarke's Magistrate's Manual, p. 235; Paley on Convictions, p. 320. In no place have I found it stated that that right is confined to cases where the defect is one of form only, and in one case at least it was permitted to be exercised where the defect was clearly one of substance: Re Plunkett, 1 Can. Crim. Cas. 365. I must, therefore, dismiss the application, but without costs, as it was justified when the notice of motion was served.

Prisoner appealed to the full Court.

On the appeal being called on, G. Patterson, for the Crown, objected that there was no appeal to the full Court from the decision of a single Judge in such a matter. Under the law of England a prisoner may make successive applications for a writ of habeas corpus to one Judge after another, or he may make a direct application to the Court in banc, but there is no appeal to the Court in banc from the decision of a single Judge in such a matter. Such an appeal was provided in the old province of Canada by the

statute 29 & 30 Vict. ch. 45. But the Dominion Parliament has not extended the provisions of that statute to the whole of Canada, and the Criminal Code makes no provision for any such appeal.

L. Laurier, contra.

THE FULL COURT (RICHARDS, J., and MATHERS, J.) held that the right of appeal in such a case did not exist in this province and quashed the appeal without costs.

RICHARDS, J., referred to Ex p. Alice Woodhall, 20 Q. B. D. 832.

BRITISH COLUMBIA.

(NEW WESTMINSTER.)

HUNTER, C.J. NOVEMBER 1ST, 1905.

CHAMBERS.

REX v. McGREGOR.

Justice of the Peace—Conviction—Certiorari—No Return of Evidence—Absence of Record of Proceedings before Justice —Invalidity of Conviction.

Application by defendant for a writ of certiorari to quash a conviction made by a police magistrate under the summary convictions clauses of the Criminal Code.

W. J. Whiteside, for the defendant.

W. G. E. McQuarrie, for the Crown.

HUNTER, C.J.:—The conviction is clearly bad. There is nothing to shew on what evidence the prisoner was convicted or even to shew how he pleaded, there being no record kept of the proceedings. It is new to me to learn that the validity or the scope of a conviction is to depend on the justice's memory, which may not be called into action for months or years after the event. If there is no record, how can there be any effective remedy or appeal?

While I am free to admit that the learned magistrate who recorded this conviction is eminently fair and upright in the

performance of his duties, yet I must not be a party to overlooking a bad precedent. The law would indeed degenerate into a thing of contempt if it came to pass that justices of the peace, most of whom are not learned in the law, were permitted to assume the role of irresponsible autocrats.

No costs and no action.

BRITISH COLUMBIA.

(VICTORIA.)

NOVEMBER 3RD, 1905.

FULL COURT.

JACKSON v. DRAKE, JACKSON, AND HELMCKEN.

Account Stated — Agreement not to Sue — Conditional Statement — Admission of Parol Evidence to Shew not Binding—Partnership—Profits.

This action was begun by writ of summons dated 2nd August, 1904, whereby plaintiff claimed the sum of $16,595.10, being money payable by defendants to plaintiff on an account stated between them, the particulars being as follows:—

1904.

March 9. To balance found to be due on an account stated in writing by defendants to plaintiff respectively in writing to be correct this day $16,595 10

Amount due from the defendants to the plaintiff. $16,595 10

The statement of defence delivered 12th October, 1904, denied that defendants were indebted to plaintiff in the sum of $16,595.10 mentioned in the statement of claim indorsed on the writ of summons, on account stated between them as alleged, and alleged that if there was any sum due by defendants to plaintiff, it was not the said sum of $16,595.10, but considerably less.

On 25th October the defendants delivered the following particulars:—

"The defendants say that the account is inaccurate, misleading, and incorrect, in that it appears to be a statement of moneys actually due by defendants to plaintiff, whereas, in truth and in fact, the said account was not, nor was it intended to be, as plaintiff well knew, an account of moneys actually due and payable by defendants to plaintiff, but merely an account shewing what would be due by defendants to plaintiff in case all the assets of defendants' firm were actually collected in. The particulars of the mistake of defendants' firm in signing the said account are that defendants signed the said account on the understanding above stated, not thinking that the same was to be taken as an account stated of moneys due and payable by them to plaintiff, and they were led into so signing the said statement by the representation of plaintiff that under no circumstances would he use the account so stated for the purpose of suing thereon, but that it would be only used as shewing the state of account as shewn by the books of the said firm."

The action came on for trial before MARTIN, J., and was dismissed by him with costs, on the ground that the document upon which the action was founded was obtained by plaintiff Jackson from defendants under a mistake, that is to say, that the document was not to be regarded as a statement of absolute liability, but only a statement of contingent liability dependent upon the collection from the firm's clients of the accounts rendered to them: 1 W. L. R. 97.

Plaintiff appealed to the full Court, and the appeal was heard by IRVING, DUFF, and MORRISON, JJ.

W. J. Taylor, K.C., and C. J. Price, for plaintiff.

E. Peters, K.C., W. C. Moresby, and A. J. O'Reilly, for defendants.

IRVING, J.:—The parties to this action are solicitors, who were in partnership by virtue of partnership articles dated 23rd November, 1889, for a period of 10 years from 1st January, 1890, plaintiff being entitled to six-fifteenths of the profits, defendant Helmcken to five-fifteenths, and defendant Aikman to four-fifteenths.

Article 13 provided that on 31st December in each year the accounts should be made up, and that the net profits of the business which should have accrued or been gained during the then preceding year should be divided between the partners.

In June, 1903, Jackson retired. He was entitled under these circumstances, by article 17, to receive and be paid out of the net profits of the business an allowance of $4,000 a year, subject to certain deductions.

The system of book-keeping adopted was this: all the accounts for professional services rendered to clients were carried into an account called "professional service account," and at the end of each year the sum total of this professional service account was divided, and the members of the firm were credited with their proportion thereof—the sum total was treated as profits irrespective of whether the bills had or had not been paid (see p. 43, Cave's evidence). See also Jackson's cross-examination (p. 75) where he says:—

"At the end of the year every bill that was rendered was treated as a good account—always treated as good assets from the earliest days. Aikman for a time was a clerk in our office, and it was always carried on on that system."

Now, the account sued on was as follows:—

"Victoria, B.C., 2nd November, 1903.

"Robert E. Jackson, Esq.:

In account with Drake, Jackson, & Helmcken.

"STATEMENT.

"By balance R. E. Jackson, acct.....	$4,923 50
" balance No. 1 acct.: (old acct.)	4,286 90
" balance No. 1 acct.: (in No. 2 acct.).....	790 60
" Annuity acct. ¼ share of net profits for year 1900	2,993 53
" Annuity acct. ¼ share of net profits for year 1901	2,229 60
1902, amount to $1,852.11, therefore leaving Mr. Aikman's proportion of profits $2,-518.86. The amount of $481.14 is deducted from Mr. R. E. J.'s share and added to Mr. Aikman's share to make the $3,000.....	1,370 97
	$16,595 10

"N.B.—The balances herein are taken up to 31st December, 1902.

"The above statement has been furnished to the said Robert E. Jackson by the said H. D. Helmcken and H. B. W. Aikman, who admit and allege, testified by their signatures hereto, that the sum of $16,595.10 is, (except as to the moneys (if any) in which they were indebted to him in respect of an account known as the Drake & Jackson Rental Account, or rent of offices and of a certain promissory note dated the 23rd day of June, 1893, made by them, the said H. D. Helmcken and H. B. W. Aikman and one B. H. T. Drake for $2,000, payable to the order of the said R. E. Jackson at the Bank of British Columbia, Victoria, on demand, with interest at 7 per cent. per annum,) the amount in which they were indebted to him the said R. E. Jackson on the 1st day of January, 1903. And the said R. E. Jackson, for the sake of peace and quiet and to avoid friction and bother, is willing to waive investigation of the books of the firm of Drake, Jackson, & Helmcken, of which the said H. B. W. Aikman was or is a member, and to agree that the said sum of $16,595.10 shall (except as aforesaid) be deemed to be the amount which was payable by the said H. D. Helmcken and H. B. W. Aikman to him on the said 1st day of January, 1903, for balance of account.

"Dated this 19th day of March, 1904.

"H. Dallas Helmcken,
"H. B. W. Aikman,
"Robt. E. Jackson."

Of this the item $790.60 is correct in this sense: that all the bills of which the $790.60 is a proportionate part have been paid; but the other 5 items are incorrect in this sense, that they are not a correct statement of profits, but are proportionate parts of the sum total of the professional service account, and in that were included a large number of bills which have not yet been paid. They are therefore not a final statement of the net profits, but are subject to a proportionate reduction in the event of certain bills not being paid.

The trial Judge so found, and there is abundant evidence to support his finding.

Assuming that this finding is correct, viz., that the statement is a conditional one, this document would not be such a

statement of account as would sustain an implied promise to pay.

The trial Judge also found that there was an express agreement that there should be no such promise implied, and there is evidence to support this finding.

At first sight it is somewhat difficult to reconcile defendants' silence, after the receipt by them of the letters J17 and J18, with the findings of fact. These letters, read with the document sued on, make a strong case for plaintiff, but, if it is borne in mind that by the practice of the office the accounts were payable only when collected, there was no occasion for defendants to write setting up this contention. They, remembering Jackson's express promise not to sue, would think that Mr. Prior was aware of the practice of their office, and that in writing these letters he was merely asking for a settlement of those moneys which had actually been collected.

The case made by plaintiff in his opening was simply for the exact proportion payable to plaintiff for his share of profits according to the account signed by defendants. In the cross-examination of defendant Helmcken an effort was made to shew that the figures arrived at were arrived at as a compromise. The Judge who presided at the trial has made no finding as to this, but it is clear that the matter was present to his mind—see the reference to McKellar v. Wallace—and I infer from his judgment that he did not find that there was a compromise. I am unable to see any suggestion of compromise.

It is by no means uncommon to admit evidence to shew that the account stated is not binding, e.g., Thomas v. Hawkes, 8 M. & W. 140, where Abinger, C.B., having refused to receive evidence offered by the defendants to shew that mistakes to their prejudice existed in the account, a new trial was granted.

Again in Perry v. Attwood, 6 E. & B. 691, where the defendants set up, as a defence to a demand, an account stated, and that the balance (a smaller sum than that claimed) was paid, it was held that the plaintiffs were at liberty to reply that the accountings were not correct, and items had been omitted by mistake, and the balances had been struck on such accountings. Again in Lemere v. Attwood, 6 H. & N. 656, where the defendant gave an I.O.U., but escaped liability thereon by shewing that there was no real existing debt

due—the I.O.U. having been given as security for a prospective debt.

On the whole, I agree with the conclusion of facts arrived at by the learned trial Judge.

In my opinion the appeal should be dismissed with costs.

DUFF and MORRISON, JJ., concurred.

BRITISH COLUMBIA.

(VICTORIA.)

NOVEMBER 3RD, 1905.

FULL COURT.

CITY OF VICTORIA v. MESTON.

Municipal Corporations—Local Improvements—Assessment of Properly Owners—By-law—"Cost" of Works—Price of Lot Acquired for Prolongation of Street—Interest—Commuted Payment—Time for Making—Tender after Time Expired—Extension of Time—Resolutions of Council.

Appeal by plaintiffs from judgment of HUNTER, C.J., dismissing the action, which was brought to recover the amount of an assessment upon defendant for his share of the cost of certain local improvements. Defendant tendered $540, and the Chief Justice held that this was sufficient and should have been accepted.

The appeal was heard by IRVING, MARTIN, and MORRISON, JJ.

W. J. Taylor, K.C., for plaintiffs.

E. V. Bodwell, K.C., and H. D. Helmcken, K.C., for defendant.

IRVING, J.:—The council in 1892, pursuant to the powers conferred by sec. 273 of the Municipal Act, 1892, passed by-laws for the prolongation of Broad street from Pandora street to Cormorant street, and, in pursuance of the system

then in force with reference to the assessment for local improvements, assessed the adjacent property with the whole cost of the proposed improvements.

The share in proportion assessed against the defendant's property was $1,040, or 10 annual instalments of $104. The total sum required, including the amount necessary to form a sinking fund and interest, was $18,000.

It was urged by Mr. Bodwell that the by-law was bad in that the sum of $18,000 (1) included the price of a lot required for the prolongation of the street, and (2) interest to accrue due. These two items, he said, were not fairly included within the word "cost."

The Chief Justice did not deal with these subjects, and I presume from his silence that they found no favour with him.

Referring to Biggar's Municipal Manual, p. 910, I find the following note: "The term 'cost' includes the contract price for work, probably also engineering expenses connected therewith, the cost of advertising and serving notices, the expenses of the issue of debentures, any discount on their sales, and the interest upon any loans obtained thereunder."

In the case of prolonging a street it seems to me that the word "cost" would include the purchase of the land required for the prolongation.

In 1899 the Municipal Act was amended so as to permit the city to contribute one-third, afterwards increased in 1902 to two-thirds, of the cost of this particular improvement.

The section is as follows: "The council of the city of Victoria shall have power by by-law, which need not be submitted to a vote for the assent of the electors, to contribute any amount not exceeding one-third of the cost of the improvements mentioned in the Broad street local improvement assessment by-law, 1892, by repaying such proportion to the persons who have made payments under said by-law, or their personal representatives, and by deducting such proportion from the instalments remaining to be paid under said by-law."

In July, 1902, the council, purporting to act under the powers conferred on them by the above section, passed a by-law called the "Broad street assessment relief by-law," by which they declared that "all persons in class D." (of whom Mr. Meston was one) "who should on or before the 10th November pay to the city such a sum as would, with the amounts already paid, make up one-half of the total assessment as provided by the original by-law in the last column

of the schedule in section 3 thereof" (by reason of the omission to provide for the payment of interest this sum was $540 only), should be excused from making any further payment.

Now, if Mr. Meston had then and there paid the sum of $540, I am inclined to think with the Chief Justice that the city would not have any right to exact from him, as they now propose to do, any interest; but that question does not now arise, as he did not pay the sum of $540, or any other sum before 10th November.

The consequence was that another clause of the by-law came into operation, which clause provides that the "date of payment named, that is, the 10th November, 1902, is of the essence of this by-law, and should the amounts directed not be paid on the day named the right of the corporation to recover the total assessment shall remain in full force and virtue as if this by-law had not passed."

As Mr. Meston neglected to take advantage of the condition, I have arrived at the conclusion that he must pay the full amount of the assessment.

The contention he raised before the Chief Justice was that the time was extended from 10th November to 1st December by virtue of the two resolutions of the council, and on 1st December he did pay, or at any rate tendered, to the city treasurer the sum of $540.

The learned Chief Justice came to the conclusion that the extension of the time by the two resolutions in question was sufficient to alter the by-law. As I understand it, his judgment depends upon the question as to whether or not the fixing of time was an essential part of the by-law. It seems to me that is not the point, but the question is this, the time having been fixed by the by-law, can it now be changed by resolution. No authority was cited to us on this point, and I presume no authority can be found. A resolution can no more alter a by-law than it can alter a statute. A by-law is not an agreement but a law binding on all persons to whom it applies, whether they care to be bound by it or not: per Lindley, L.J., in London Association of Ship Owners v. London and India Docks, [1892] 3 Ch. at p. 522. "It has the same effect within its limits and with respect to the persons upon whom it lawfully operates as an Act of Parliament has

upon the subjects at large:" Lord Abinger in Hopkins v. Swansea, 4 M. & W., 640.

Appeal allowed.

MARTIN and MORRISON, JJ., concurred.

BRITISH COLUMBIA.

(VICTORIA.)

NOVEMBER 3RD, 1905.

FULL COURT.

RE CAMERON AND CITY OF VICTORIA.

Municipal Corporations — By-laws — Local Improvements — Extension of Street—Expropriation of Land for—Petition against Extension—Status as Petitioner of Owner of Land Expropriated—Withdrawal of Petitioner—Internal Regulations of Council—Discretion as to Quashing By-laws—Substantial Compliance with Statute — Expropriation of Land not Shewn on Plan — Non-assessment of Property Benefited — Report of Assessor — Finality in Absence of Fraud—Cost of Sidewalks.

Jessie Cameron, the owner of the westerly 40-foot strip of lot 1767 in the city of Victoria, which piece of land the council of the city had determined to expropriate in order to prolong Birdcage walk, applied to MARTIN, J., to quash two by-laws, namely, by-law No. 441, a by-law to expropriate the above mentioned 40-foot strip, and by-law No. 442, a by-law for carrying out the extension of Birdcage walk as a local improvement, at the expense of the persons benefited thereby.

MARTIN, J., came to the conclusion that there were no merits in the application and discharged the rule nisi.

Mrs. Cameron appealed to the full Court and her appeal was heard by IRVING, DUFF and MORRISON, JJ.

Lindley Crease, for the appellant.

W. J. Taylor, K.C., for the city corporation.

IRVING, J.:—The two by-laws are separate and distinct by-laws, although both relate to the same subject, namely, the extension of Birdcage walk, and as incident to that the expropriation of Mrs. Cameron's property.

The facts are not in dispute and are as follows. On 6th June, 1904, the council passed the following resolution: "That the council hereby determines to extend Birdcage walk from Michigan street to Carr street, and for this purpose to expropriate the necessary land and do all acts necessary for the purpose of opening, grading, and macadamizing the said extended street, the whole work to be done under the provisions of the local improvement general by-law."

It will be observed that this resolution is the common foundation of both by-laws. A good deal of confusion has, in my opinion, arisen in consequence of failing to recognize that the preliminaries to the passing of a local improvement by-law are quite different to steps taken in passing an expropriation by-law. I shall endeavour to point out the difference between the course adopted with reference to the passage of a local improvement by-law and that to be followed in the case of an expropriation by-law.

By sec. 245, sub-sec. (1a), of the Municipal Clauses Act, the council has authority to make a general by-law for ascertaining and determining what land or real property will be immediately benefited by any proposed improvement, the expense of which is proposed to be assessed upon the land or the real property immediately benefited thereby, and of ascertaining and determining the proportions in which the assessment is to be made on the various portions of land or real property so benefited. . . ."

By-law No. 343, which was passed on 6th March, 1901, is the general by-law passed under that section, and that by-law and the sub-sections of sec. 245 prescribe the preliminaries and govern the procedure generally, with reference to the passage of local improvements by-laws, such as by-law No. 442. The expropriation by-law, No. 441, is not touched by the provisions of by-law No. 343, or sec. 245.

The procedure governing in the case of an expropriation by-law is to be found in sub-sec. 127 of sec. 50, as restricted by secs. 239, 240, and 241.

A by-law for expropriating your property may be introduced and passed by the council without any notice to you whatsoever. Before it comes into effect, however, a notice

must be given in the public newspapers, and before the council enter upon your land they must prepare plans, etc., and issue a notice of their intention to proceed with the work, and you must file your claim for damages within 60 days. Arrangements are then made for settling the amount of compensation you are to receive.

The procedure relating to assessing your property for the cost of a local improvement is quite different.

The council, having by resolution determined that a certain work shall be undertaken as a local improvement, send the resolution to the assessor and city engineer to work out the details of the proposed undertaking, and to ascertain the cost thereof, and to adjust the proportions of the tax payable by the different persons whose properties are (or are supposed to be) benefited by the scheme.

These officers report to the council. If the council adopt their report, notice must be given in the public newspapers that the report on the scheme is now open for inspection. If within 15 days from the publication of the notice a petition is presented to the council against the improvement, of which notice has been duly advertised (see secs. 19 and 20 general by-law 343), it shall be the duty of the assessor to ascertain in accordance with sub-sec. 21 of sec. 245 of the Municipal Clauses Act, and report to the council, whether the said petition is signed by a majority of the owners of the land or real or assessable property to be assessed, representing at least one-half in value of said land or real or assessable property so to be assessed, and to certify his finding upon the said petition, and to report the same to the council.

Should a petition, however, not be presented to the council, or should the assessor certify on any other petition that may have been presented and entertained by the council, that said petition is not signed by a majority of the owners of such land, or real or assessable property so to be assessed and representing one-half in value of such property, then and in each case the council shall proceed with the proposed improvements under such terms and conditions as to the payment of the cost of such improvements as the council may by by-law in that behalf regulate and determine; and the assessment roll shewing the property and the amount assessed for the local improvement shall be prepared and open for inspection at the office of the assessor.

All these preliminaries having been complied with, the by-law is introduced, and, if passed, the work proceeded with.

From this it will be seen that the great difference between the by-laws of the expropriation class and the local improvement by-laws is that in the former no opportunity is afforded persons owning land required by the council to be heard on the merits of the scheme for which the land is required, whereas in the latter the resolution of the council can be defeated by any person affected obtaining and presenting a petition signed by a sufficient number of people having a sufficient amount of property involved in the scheme.

The above resolution was transmitted to the city engineer and the city assessor. These gentlemen made their report, and at the same time submitted a plan. It will be noted that in their report they assumed that sidewalks were within the scope of the resolution upon which they were required to report, though not specifically mentioned in the resolution. The insertion of the cost of these sidewalks is the 6th ground of appeal.

In making the report the whole of Mrs. Cameron's property (which was to be expropriated under by-law 441) was valued, and that value was taken into consideration in arriving at the cost of the improvement, and formed part of the total cost of such improvement. Therefore, as the whole property was to be taken from her, she could not be liable to be assessed for any part of the cost of the intended improvement, and therefore, as she was not to be assessed, she had no right to petition.

On 22nd September the council adopted the report (including the cost of the sidewalks), and a notice as required by sub-sec. 21 of sec. 245, and sec. 17 of the by-law, was duly published in the "Colonist" newspaper, notifying all persons concerned that the report was open for inspection at the office of the city assessor. This advertisement related to by-law 442, and not in any way to by-law 441.

The date of the publication in the "Colonist" is not proved, but, owing to certain statements made by the officials to Miss Cameron, there is prima facie evidence that the petition was filed in time.

Mrs. Cameron's agent called at the office of the city assessor and examined the report and plan, and subsequently circulated a petition against the improvement with the object of preventing the extension being carried out.

Mrs. Cameron was one of the signatories to this petition, notwithstanding the fact that she had not been assessed as a person benefiting thereby. For reasons already given, in my opinion she had no status as a petitioner either for or against the improvement or assessment.

The petition was received on 10th September by the clerk, but Mr. Todd, one of the signatories, withdrew by letter on the 9th; it is alleged that 4 other signatories withdrew on the 12th September, but, as it is admitted that the petition would not be sufficiently signed if Mr. Todd's withdrawal is valid or Mrs. Cameron's signature invalid, it is not necessary to discuss them.

The petition and withdrawals were considered by the municipal council on 12th September. They were then (sub-sec. 22) referred to Mr. Northcott, who, on 19th September, made his report. This report, in the absence of fraud or mala fides, is final.

The requirement as to the preliminaries to the local improvement by-law having been satisfied, the by-laws were then introduced, the expropriation by-law No. 441 on 3rd October, and the local improvement by-law on 17th October, 1904. On that day the expropriation by-law was read a 3rd time and passed.

Mrs. Cameron's agent attended at the council chamber on the following days, 3rd, 17th, and 24th October, and 7th November, with the object of watching the proceedings of the council in relation to said undertaking, and on none of the said days did the council meet in the council chamber within 15 minutes of the time appointed for the meeting of the council, namely, 8 p.m., nor did the mayor take the chair, nor did the proceedings of the said council commence at any one of the said meetings, until after 8.25 p.m. Upon these facts Mrs. Cameron bases her 7th ground of appeal. Referring to this statement the clerk of the council says in an affidavit that the rule contained in sec. 1 of the council by-law as to the time of meeting has, for many years past, been suspended. Power to suspend rules is reserved in sec. 107 of the same by-law. The rule and practice now is for the council to assemble in the committee room at the city hall previous to 8 o'clock, to consider matters of administrative detail, and confer with their officers on administrative questions of an urgent character, with the mayor in the chair, and so soon as these are disposed of the aldermen proceed to the

council chamber and continue the business. This was the course adopted at the meeting of the council when the above mentioned by-laws were considered and passed.

By sec. 88 of the Municipal Clauses Act this Court is authorized to quash by-laws, orders, and resolutions, in whole or in part, for illegality. The principles which govern the Court in the exercise of the duty cast upon them by that section have been discussed in a number of cases. . . .

[Reference to Re Huson and Township of S. Norwich, 19 A. R. at p. 350; Re Fenton and County of Simcoe, 10 O. R. 27; Re Ostrom and Township of Sidney, 15 A. R. 372; In re Caswell and Rural Municipality of South Norfolk, 1 W. L. R. 327; Lawson v. Corporation of Reach, 19 U. C. R. 591; White v. East Sandwich, 1 O. R. 530; Gallerno v. Rochester, 46 U. C. R. 279; Boulton v. Peterborough, 16 U. C. R. 380; Milloy v. Onondaga, 6 O. R. 573; Young v. Binbrook, 31 O. R. 108.]

On an application, therefore, to quash a by-law, the consideration of the questions to be determined should be undertaken in the spirit and with the object of ascertaining whether there has been a substantial compliance with all the requirements of the statute, and not of finding some slight or trivial departure on which to hinge a decision adverse to the validity of the by-law. As Cameron, J., observed in White v. East Sandwich, "the Court is not to be astute in finding grounds on which the by-law might be held defective."

I come now to the grounds of appeal. The first is: "The said expropriation by-law (441) expropriates land not shewn on the city engineer's plan or the city engineer's and city assessor's report dated 15th August, 1904, which were declared by notice dated 23rd August, 1904, published in the Victoria 'Daily Colonist' to be open for public inspection, and the said corporation was estopped by publication of such notice from varying from the scheme specified in said plan and report without like notice of such intended variation."

The answer to this is very simple. The two by-laws are separate and distinct, and, as I have already said, no notice of intention whatever was required to pass the expropriation by-law. The mistake into which the applicant has fallen is in supposing that the plan required as a preliminary to by-law (local assessment) 442 has anything to do with expropriation by-law No. 441.

At the time the city engineer's plan was prepared in August, 1904, for use in connection with local assessment by-law No. 442, the expropriation by-law had not been introduced.

The second ground of appeal is: "The proposed assessment under said assessment by-law (442) is inequitable in that property fronting on the proposed new road and immediately benefited thereby (particularly lot 1766 and the easterly 20 feet of lot 1767, this included) is not assessed."

The question is one for the city engineer and the city assessor. If they came to the conclusion that this portion was not immediately benefited, why should it be assessed?

In an application to quash a by-law passed by the township of Raleigh, In re Montgomery, 21 C. P. 381, it was suggested that certain lands mentioned in the by-law were not the only lands benefited. Gwynne, J., said, p. 393: "As to the third objection, we are of opinion that, if it be a question open for us to consider whether or not the lands assessed are the only lands benefited, the onus of proving that other lands were also benefited in the township of Raleigh which should have been assessed, lies upon the applicants, and the just conclusion to draw from the numerous affidavits filed is, that the applicants have wholly failed to establish their contention upon that point. We are, however, of opinion that the contention that all the lands which will be benefited by the proposed works have not been assessed, or that for that or any other reason the several assessments made upon the respective lots, or any of them, are overcharges; or that the by-law does not provide properly for determining what lands are benefited, do not constitute ground for moving to quash the by-law."

The 3rd ground is: "A contra petition dated 30th August, 1904, was filed and presented within the time limited, representing names and values competent to prevent the passage of the said by-laws, pursuant to sec. 245, sub-sec. 21, of the Municipal Clauses Act."

After Mr. Todd withdrew his name, the contra petition was insufficiently signed. It was suggested that having once signed his name he was not at liberty to withdraw. In my opinion, he could withdraw at any time until the matter was reported upon by the assessor, i.e., until 19th September, but, however that may be, his signature to the petition was of no value after he had sold his property. In any event the report

of the assessor, in the absence of fraud or mala fides, is final: see In re Montgomery, 21 C. P. 381, where it was decided that an objection of this kind could not be raised in Court on motion to quash the by-law, because the legislature had appointed a particular person to investigate this very matter, but that, even if it was open to the Court, the onus was on the applicant.

The 4th ground is: "(a) The said expropriation by-law (441) expropriates land which is not necessary or convenient for the proposed work; and (b) the said assessment by-law (442) imposes an assessment to meet the cost of expropriating such land, and also of land not mentioned in the engineer's plan or the engineer's and assessor's report aforesaid."

This objection must be divided. The question whether the expropriation by-law, 441, takes away land which is not necessary or convenient is one for the council to determine, upon the report of their officers. One of the objects of electing annually a council is to secure the services of gentlemen in touch with the wishes of the community; they are elected to determine these very questions, and the Courts can only have jurisdiction where there is fraud or mala fides. It would require very strong evidence indeed to support interference by the Courts in a matter of this kind.

It is hardly necessary to say that there is no such evidence. On the contrary, I think the assessor and engineer have shewn a proper consideration in expropriating the whole of Mrs. Cameron's lot, instead of leaving on her hands a small triangular piece of land. In carrying out works of this kind much must necessarily be left to their good judgment, and in this case I think they have done their duty in a way which to me, as a ratepayer, and therefore liable to come under their jurisdiction, is very gratifying.

As to the last part of this objection, namely, that a certain piece of land not shewn in the engineer's plan or report as required, is being expropriated, I think the plan is defective in that respect, but the omission is so trifling that it should be overlooked.

The 5th ground was not argued.

The 6th is: "The cost of sidewalks, which were not mentioned in the resolution of the council dated 6th June, 1904, by which it was resolved to extend Birdcage walk from Michigan street to Carr street, under the provisions of the

local improvement general by-law, should not be included in the amount assessed; or in any event the amount to be expended on sidewalks should be specified (vide sec. 50, sub-sec. 122, Municipal Clauses Act)."

It is true the cost of the sidewalks was not mentioned in the resolution, but in my opinion it is not the function of the resolution to give the details of the proposed scheme. That is the duty of the engineer and the city assessor when they make their report. This report we have seen was adopted by the council, and it is the report that is open for inspection. The resolution merely sets before these officers a general outline of the proposed scheme, and the public are not concerned with its exact terms.

The 7th ground is: "The meetings of the council at which the by-laws were dealt with were irregular and the proceedings contrary to the Municipal Clauses Act and city by-law No. 331."

It is to be observed that there was no protest from any member of the council as to the course adopted, nor is there any suggestion that the council were not unanimous in adopting the course they did adopt on the nights in question: see Rex v. Kynaston, 2 Selw. N. P. 1143. In re Jones and City of London, 30 O. R. 583, the Court refused to quash by-laws which were impeached on the ground that the internal regulations had not been observed.

In Heffernan v. Town of Walkerton, 6 O. L. R. 79, 2 O.W.R. 17, 434, the council, against the protest of the minority and in direct contravention of the procedure by-law of the council, passed a by-law for the payment of a certain sum of money not provided for in the estimates. A ratepayer asked for an injunction to restrain the council from acting on the by-law. Street, J., thought that, as a member of the council had protested, the by-law should not be supported, but Falconbridge, C.J., and Britton, J., thought that in the exercise of their discretion the injunction should be refused. The view they took was simply this, that the plaintiff was acting in a spirit of hostility to the late mayor, to whom the payment was to be made.

See also the opinions of Killam and Bain, JJ., in Re Rural Municipality of Macdonald, 10 Man. L. R. 382.

The 8th ground is: "Said Jessie Cameron has been illegally deprived of a voice on the question of these by-laws or the contemplated work."

I can only answer this by saying with reference to the local improvement by-law, that she has had all the opportunity the legislature thinks she is entitled to; and with reference to the expropriation by-law, that no notice is required for the passage of the by-law. The notice of intention to proceed under the by-law is not yet due.

On the whole, I agree with the decision appealed from, and in my opinion the appeal should be dismissed.

DUFF and MORRISON, JJ., concurred.

BRITISH COLUMBIA.

(VANCOUVER.)

NOVEMBR 8TH, 1905.

FULL COURT.

DUNCAN v. TOBIN.

Promissory Note—Payment by Plaintiff—Liability of Defendant as Joint Maker — Contribution — Defence — Counterclaim—Accounts—Costs.

Appeal by defendant from judgment of a County Court in favour of plaintiff in an action for a money demand.

The appeal was heard by IRVING, MARTIN, and MORRISON, JJ.

F. C. Wade, K.C., for defendant.

A. E. McPhillips, K.C., for plaintiff.

IRVING, J.:—Prior to 13th June, 1901, one Brochu had obtained an option from Nichol on a mine. Under the option Brochu had made all payments but one. This last payment was secured by Brochu's note for $350, which fell due on 3rd July, 1901. On the payment of this note (which together with the title deeds to the mine was held by the Bank of British North America in escrow) the mine would become the property of Brochu.

On 13th June, 1901, Nichol granted to plaintiff an option for 30 days on the property, on the terms that plaintiff

should take up the $350 note above mentioned, and pay the balance, the amount of which is not mentioned, in 6 months, the balance on bed-rock.

On the day before the Brochu note fell due, plaintiff had an interview with defendant with reference to making some money out of the sale of this mine, for which Duncan said he had a purchaser. Plaintiff and defendant differ as to what took place at this interview, but at any rate the interview resulted in plaintiff and defendant making a note in favour of one Tabor, who indorsed it for their accommodation.

This note they discounted with McMillan, and Tobin repaired to the bank and paid the Brochu note, and received the papers.

Whether he understood Duncan's plan in the first place may well be doubted. I question if Duncan himself had a clear idea of what he could do, but this much is plain, that when Tobin opened the papers he must have known the position of affairs. In fact, he told Duncan he must get a bill of sale to himself or reimburse him (Tobin) and Tabor. Duncan accordingly wrote the letter of 9th July, 1901, and in the meantime, that is, between 3rd July and the date of the letter, Duncan was endeavouring to sell the claim, but without success.

There is some dispute as to whether exhibit 6 was the letter read over by Tobin. Plaintiff swore that it was, and there was no cross-examination on the point. I have arrived at the conclusion (though not without some doubt — see Duncan's letter of 23rd September, 1901), that the facts of the case bear out plaintiff's contention.

I now return to the letter of 9th July, 1901. It is written to one Mitchell, who appears to have been connected with Brochu in some way in regard to this mine. He was also a friend of Duncan's.

Duncan now writes to him, and Tabor stands by while the letter is being written and afterwards mails it. It is couched in an extraordinary strain: "As you requested, I tried to sell this claim; to save you, I raised the money to make the final payment on Brochu's option. No. It was not a payment on account of the option I held, it was merely to save you." He then proposes—for so I read his letter,

although there is a hiatus in it—that Mitchell should either repay him and Tobin the money they had raised, or get Brochu to execute in blank a bill of sale in consideration of the $350 paid to retire the Brochu note, and a further sum of $100, which further sum, he, Duncan, said he was not in a position to guarantee, but which he hoped and expected could be made on the sale. Altogether this letter is pregnant with meaning, and must be carefully studied by any one wishing to understand the facts of this case.

The fate of the claim and the history of the note sued on can be now stated shortly.

Duncan left the Yukon, leaving with Tobin a promissory note signed in blank, which was to be used to retire the note of 2nd July in the event of the mine not being sold in the meantime.

The mine was not sold, and Tobin filled in the note, and after indorsing it—on the previous note he had signed as maker jointly with Duncan—he got Tabor's indorsement and handed it to the bank, in renewal of the original note of 2nd July.

He and Tabor renewed this note, and he made several payments on account of principal and interest.

As to the mine. Tobin caused it to be re-located, but somebody jumped it, and so there was nothing left of the venture but the note and this question of its payment.

Tobin and Tabor then caused the bank to sue Duncan on the note of 1st October, 1901. Judgment was obtained against him for $479.35, debt and costs.

Duncan then brought this action in the County Court against Tobin for $239.67½, being one-half the above amount, for moneys paid by plaintiff at his request.

Tobin's defence was that he merely indorsed the note sued on as an accommodation for Duncan, or that he and Tabor were joint guarantors, and so he was only liable for one-third.

In the alternative, that he was not liable at all, as Duncan had fraudulently represented to him at the time he was induced to indorse the note that he, Duncan, was buying the claim for the sum of $420, and that he and Duncan were to share in the profits of the sale of the claim.

He counterclaimed for $241, of which the particulars are as follows:—

Particulars:

Paid one Carlson for relocation of said mining claim	$ 25 00
Paid interest to bank	125 00
Paid account principal to bank	210 00
	$360 00
Cr.	
By amount refunded by bank	119 00
	$241 00

And also $250 for damages for fraud and deceit.

The evidence of Tabor, Tobin, and Finlaison, the accountant of the bank at Dawson, who also held a power of attorney, was taken on commission in shorthand, and at the trial the testimony of Duncan was heard. Of his evidence we have merely the Judge's notes. For that reason we cannot make so minute an examination of his evidence as I should like to make—cf. remark of Hunter, C.J., in Johnson v. Appleton, 11 B. C. R. 128, 132.

The County Court Judge found that plaintiff and defendant were jointly interested in the adventure. In that conclusion I agree. Whatever may be said about the misunderstanding that existed when Tobin signed the note, it is clear that when the letter of 9th July was written, Tobin was fully aware of the position. His letter of 8th October, 1901, to Duncan, shews that he had accepted the position in which he found himself: "I could make no transfer of the claim, but on the 2nd October got a renewal of the note." Again, "I told him (Brochu) he would have to represent the claim." In short, he identifies himself as being equally interested with Duncan in the venture, and makes no complaint of false representation.

The judgment of the County Court was entered for Duncan for $239.67½ with costs, but nothing was said about the counterclaim.

I think this judgment is wrong, because defendant Tobin is undoubtedly entitled to credit for $25 for renewing the claim, and possibly also for moneys paid on account of the

note, but on that I express no opinion. I think the County Court Judge should not have treated this as an action on a promissory note simply, but, after having ascertained the relations the parties bore to one another, he should have thrown the pleadings aside and should have then and there proceeded to take the accounts between them on that footing.

As to the contention that he was liable for one-third only, that would depend on Tabor taking a one-third interest in the claim. This Tabor says he did not take. His indorsement was given without consideration.

The appeal should be allowed with costs, and the matter referred back to the County Court Judge to take the accounts between the parties and deal with the question of costs.

With reference to the question of costs my brother Martin would distinguish between the appeal on the claim and the counterclaim. In my view the whole matter should have been dealt with in one judgment.

MARTIN, J.:—This appeal has two distinct branches, one on plaintiff's original claim, and the other on defendant's counterclaim.

As regards the former, I can find no good reason for disturbing the judgment entered by the County Court Judge on the facts as found by him.

As regards the latter, a difficulty arises because the counterclaim is divided into two branches, one of which is a true counterclaim for damages for $250, as in an action of deceit, but the other, though styled a counterclaim only, is not one at all, but a set-off for money alleged to be paid by defendant at the request of plaintiff in connection with the transaction sued on. As pointed out by Odgers on Pleading, 1903, pp. 234-5, the distinction between set-off and counterclaim is as important as it ever was in many practical respects, and it is unfortunate that they should have been confused in the present case, because it has a direct bearing on the question of costs.

So far as the true counterclaim is concerned, i.e., the cross-action for damages, it should have been dismissed with costs. As regards the set-off, wrongly pleaded as a counterclaim, it should have been considered in reduction of plaintiff's claim, but neither of the questions of set-off or counterclaim was dealt with by his Honour in his reasons for judgment, and, so far as the set-off is concerned, this was probably due to defendant having improperly pleaded it as afore-

said, though it should have been specially pleaded as a defence in the County Court: Gelinas v. Clark, 1 M. M. C. 429, 8 B. C. R. 42.

In such circumstances, the only course open seems to be to send the matter back to the County Court Judge to consider the set-off and so-called counterclaim in their true relation to the original action, and enter judgment for the balance, following the usual course as directed in Shrapnel v. Laing, 20 Q. B. D. 338, with costs on the principle laid down in Atlas Co. v. Miller, [1898] 2 Q. B. 500.

There remains the question of the costs of this appeal. As a general rule, subject to certain stated exceptions, the statute says (sec. 100, Supreme Court Act) that "the costs of every appeal to the full Court . . . shall follow the event." What the "event" is, is not easy to say in some cases. Here, for instance, on the true counterclaim, the appeal having been successful should be dismissed with costs, because though for purposes of execution there is but one judgment, yet the counterclaim is to be "treated as an independent cause of action and . . . as if the claim did not exist:" Atlas Co. v. Miller, supra, at p. 505; and the same high authority states that counterclaims are "cross-actions for all purposes of procedure and evidence:" p. 506.

Then as regards the other branch of the appeal, i.e., the original action. On this plaintiff would have succeeded, less whatever deduction should have been made on the set-off, if it had been properly pleaded. What defendant should have done at the trial is quite clear, viz., applied to have amended his defence: King v. Wilson, 11 B. C. R. 109; and had the issues defined in such a way that the trial Judge could have dealt with them properly, and the costs thereof.

The result is unfortunate, as it was in King v. Wilson, but peculiar situations can only be dealt with on strict principles of justice, and therefore I am of the opinion that so far as the appeal on the original claim is concerned, the appellant has not on the issues properly before the Court been successful in the "event" in the true sense of that word, and therefore he cannot have his costs thereof, and that this branch of the appeal should only be partly allowed and to the extent of referring it back to his Honor in conjunction with the counterclaim as above stated, and that the costs of such reference should follow the event of the further inquiry.

MORRISON, J., concurred with the judgment of IRVING, J.

BRITISH COLUMBIA.

(VICTORIA.)

NOVEMBER 9TH, 1905.

FULL COURT.

WOOLARD v. CORPORATION OF BURNABY.

Nuisance—Ditch Overflowing Lands—Municipal Corporation —Injunction—Damages.

The plaintiff's lot, 155a, which was situate to the west of the Fraser river, was, prior to 1895, bounded on the east by Woodward's lot, 173.

In 1880 and the following years the plaintiff enlarged a ditch which he found there running along the easterly boundary of lot 173 from the south-east corner of lot 155a to the Fraser river.

This ditch, called Woolard's ditch, was of sufficient capacity to drain his land.

In November, 1895, the defendants, without passing a by-law, built a road between the plaintiff's lot and lot 173, and on the west side of this road constructed a ditch, the lower or southern end of which terminated in the upper or western end of Woolard's ditch.

In 1876 Woodward, who afterwards left the district, without any permission from the defendants, built a ditch, and by means thereof turned the waters of the creek into the upper end of the ditch constructed by the defendants.

In addition to this creek water, certain irrigation ditches were in 1900 constructed so as to empty into the Holland ditch.

Neither the Holland ditch nor that built by the plaintiff being of sufficient capacity to take all this water, the plaintiff's land was swamped for some 18 or 20 acres in the vicinity of the junction of the two ditches. The defendants, to remedy this trouble, decided to enlarge the Woolard ditch, and they actually did some work at the upper end, but stopped it for want of money.

The plaintiff then brought this action in the County Court, and the County Court Judge gave judgment for damages in his favour.

Defendants appealed, and their appeal was heard by IRVING, MARTIN, and DUFF, JJ.

Joseph Martin, K.C., and J. A. Rowland, for defendants.

A. D. Taylor and J. B. Cherry, for plaintiff.

IRVING, J.:—The reported cases establish this principle, that where local authorities are committing or allowing that to be done which is a nuisance, and which they can physically on their own premises prevent, but refuse to do so, the Court will entertain a suit against them and in a proper case grant an injunction. But where it is not physically possible for the corporation to stop a nuisance on their own premises the Court will not grant an injunction.

The case of Attorney-General v. Dorking Union, 20 Ch. D. 595, illustrates the latter of these two propositions. There the Court, consisting of Jessel, M.R., and Cotton and Lindley, L.JJ., were dealing with a case in which it was contended for the plaintiff that the corporation could prevent a nuisance in two ways: (a) by bringing an action; or (b) taking proceedings under the powers of the Health Act against the persons who were in fact causing the nuisance by sending their sewage into the stream.

The case of Charles v. Finchley Local Board, 23 Ch. D. 767, is the authority for the first proposition.

The point in this case is: Can the defendants physically prevent, without committing a trespass, the water from this creek coming down the Holland ditch?

I have read the proceedings before the County Court Judge, and I am unable to find any evidence touching this point. For this reason I think the County Court Judge was right in not granting an injunction.

As to the claim for damages: It would appear that without the interference of Woodward the water from this creek would not flow into the Holland ditch. The authority of Milton v. Corporation of Surrey, 10 B. C. R. 325, does not touch this case.

I would allow the appeal on the ground above stated, unless the plaintiff desires a new trial. In such case, he ought to pay the costs thrown away by the last trial and also of this appeal.

DUFF, J., agreed with IRVING, J.

MARTIN, J.:—Before the defendants opened the road and built the ditch in question the plaintiff's lands were kept dry by his own ditch to the Fraser river, but since that time they have become wet owing to the increased flow of water which is discharged by the defendants' ditch. The chief cause of the increased flow is in the fact that the defendants in effect permitted, by taking no steps to prevent what was being openly done, one Woodward to drain his land, abutting on the new road, into its said ditch, by cutting across the new highway and connecting his then blind creek with the new ditch on the other side of the road. The water thereafter so flowing from Woodward's place had not formerly been discharged into the plaintiff's ditch, and the result was to overflow it and back up the water on to his land, causing considerable damage. The road and ditch are both in the exclusive control of the corporation, and as the result of the extension thereof foreign water has been brought into the defendants' ditches, and the natural servitude to which his land was subject has been increased, as I found had been done in the somewhat similar case of Milton v. Corporation of Surrey, and the judgment was affirmed, 10 B. C. R. 296. The damage and the cause of it are not in dispute, but the defendants' counsel contends that it is a case where the defendants would have to prevent Woodward's draining by means of an injunction, and that they cannot be compelled to apply for one against him, and that the plaintiff himself should take action against Woodward. Much reliance is placed on the language of Jessel, M.R., in Attorney-General v. Dorking Union, 20 Ch. D. 595.

But according to the evidence before us, there is, in my opinion, no necessity for an application for an injunction, for there is no reason why the defendants could not very easily and cheaply stop this inflow of foreign water, should they feel so disposed,—a few stout planks, a few loads of soil and a few hours' work, would, as I gather from the evidence, be all that is necessary. Or the plaintiff might be relieved by enlarging his ditch to the Fraser, though that would be a larger and doubtless an expensive undertaking.

A number of authorities have been cited, and I have perused many more, but the case is similar to Charles v. Finchley Local Board, 23 Ch. D. 767, in that it was and is within the power of the defendants to prevent the nuisance in the way I have indicated, and consequently the case is not

one where the nuisance can only be stopped by bringing an action, as, e.g., in Gray v. Corporation of Dundas, 11 O. R. 317. In my opinion, on the special facts of this case, it is a stronger one for the plaintiff than Charles v. Finchley Local Board, and he is entitled to the relief he obtained in the Court below. There are also expressions in Law v. Corporation of Niagara Falls, 6 O. R. 467, which support this view.

During the argument our attention was drawn to the fact that the opening of roads and making of ditches in low lying localities are works of importance which often have unexpected results, and it would be well for municipalities to realize that a due amount of care should be exercised before and during their construction.

The appeal should be dismissed with costs.

Appeal allowed; MARTIN, J., dissenting.

BRITISH COLUMBIA.

(VICTORIA.)

NOVEMBER 9TH, 1905.

FULL COURT.

RE TELFORD.

Physicians and Surgeons—Expulsion of Registered Member of College — Unprofessional Conduct — Evidence — Appeal —Costs.

Appeal by the Council of the College of Physicians and Surgeons of British Columbia from an order of MORRISON, J., under the British Columbia Medical Act, 1898, allowing an appeal from the decision of the Council that one Telford, a registered member of the College, had been guilty of infamous or unprofessional conduct, and decreeing his expulsion.

The appeal was heard by IRVING, MARTIN, and DUFF, JJ.

A. E. McPhillips, K.C., and E. P. Davis, K.C., for the appellants.

Joseph Martin, K.C., for Telford, the respondent.

DUFF, J.:—We are to decide two questions: Was the respondent guilty of infamous or unprofessional conduct in respect of the matters comprised in the terms of the charges against him? And if so, was his misconduct of such a character as to justify the imposition of the extreme penalty of expulsion?

As to the first question: We must after his trial and acquittal by the County Court Judge put aside any suggestion that the respondent was concerned in procuring an abortion; and attending to that circumstance I am not prepared to say that his actions can justly be described as infamous, but I regret that I cannot conclude that he can escape condemnation on the charge of unprofessional conduct.

His patient, a young unmarried woman, who, being pregnant, had to his knowledge unsuccessfully endeavoured to effect a miscarriage, asked him to perform on her a criminal operation for abortion. The respondent supposing that it might be necessary to expel the contents of her uterus, owing to the patient's condition arising from these unsuccessful attempts, inflicted a wound on her body with the object of enabling him and his patient the more effectually and easily to deceive her parents and others with respect to her real condition by causing them to believe that she had been operated on for the removal of the appendix. This he did in a private sanitarium under his own exclusive control and without consultation. I may add that the father (whom she resided with and was dependent on) was, in answer to his inquiries as to his daughter's condition, informed by the respondent that she was suffering from appendicitis; and I should also say that the incision made by the respondent did and could serve no purpose relating to the health of the patient.

A more careful consideration of the views of Morrison, J., and the able argument addressed to us in behalf of the respondent, has not altered the view I formed at the hearing of the appeal that the medical council were justified in treating this conduct as unprofessional. The legislature has conferred on that body the power to erase from the register the names of physicians and surgeons on being satisfied after proper inquiry that such persons have been guilty of unprofessional conduct. That enactment assumes the existence of some standard of professional conduct, or of some negative

limits of professional conduct, which shall be regarded in the exercise of that jurisdiction.

It is not necessary, I think, to define these limits, and I do not attempt it. Of course the primary end with every physician and surgeon is the health of those who are the objects of his professional attention. But, subject to this paramount consideration, when one considers the fact (not disputed, but demonstrated to superfluity for those who doubt, by the evidence taken on this inquiry) that the practice of abortion is a prevalent practice in this province; and the grave and visible menace to the social welfare which the practice involves; it will not, I think, be disputed that an obligation rests upon those to whom the community has committed the exclusive privilege of practising medicine and surgery (not as individuals only, but more especially as a body exceptionally recognized by the law) that they shall not pervert the professional skill which the law protects, or abuse the professional status which the law sustains by practices which, if general, would manifestly facilitate the spreading advance of this most dangerous evil. Nor can I perceive how it can be successfully maintained that the deliberate breach of this obligation by a physician or surgeon, to no purpose connected with the bodily health of a patient, does not fall within the description "unprofessional conduct," as that phrase is used in sec. 36 of the Medical Act. Leges mente intelligendæ; and one cannot suppose that in enacting this section the legislature left out of view a matter so weighty in its bearing on the relations of the medical profession to the community at large. When, therefore, a surgeon, under the colour of practising his art and under the protection of his professional status, for no purpose relating to the health of a patient, prostitutes his skill and his status in performing a wholly pretended operation, in circumstances such as those disclosed in this case, I cannot doubt that, in the absence of some instant compelling moral necessity, he brings himself within the language of that section as having passed beyond the bounds of reasonably justifiable professional conduct; and if in support of this view any argument be needed, surely it is sufficient to say that if such things may be legitimately practised, they may be generally practised; and that the general sanction of such practices would give a great and almost incalculable impulse to the growth of the kind of crime which I am compelled by the nature of this case so much to discuss.

The respondent acted under the spur of no compulsion. There was none in the state or situation of his patient; none in the state or situation of those whom he might properly regard by reason of their relation to her. His exculpation is urged on two inconsistent grounds: First, he says that he was impelled by his apprehensions concerning the effect upon her parents of their discovery of his patient's true condition; and, second, that he did not care a "snap of his finger" for her parents, but was influenced only by his apprehensions of future disclosure to the world. Of these, the first may be dismissed as mere vague surmise, having no foundation but the extravagant fears of his patient, and no warrant to recommend it to any man of moderate firmness and intelligence; the second, in view of the fact that his patient's intended husband knew and was responsible for the fact, seems destitute of substance; and at all events presents no justification which would not exist in any case in which a surgeon, yielding to the like importunities, should be persuaded to perform the like service. Mr. Martin strongly pressed upon us the view that at the decisive moment, the respondent was not a free agent; that his hand was forced by the rapid development of events beyond his control. Although I am not insensible to the infirmities under which, after the fact, one attempts to analyze and appraise a course of conduct pursued under some anxiety and stress of mind, I cannot doubt that the respondent's embarrassments followed naturally and inevitably from the fact that, at the outset, he consented to palter with his obvious duty.

But, in truth, the question in these cases is not an ethical question. The professional tribunal appointed to investigate them cannot, in the nature of things, set before itself the task of reading the secret counsels or weighing the motives or balancing the weaknesses and the temptations of the person against whom the accusation of misconduct is levelled; they must assume that he is gifted with that share of knowledge and judgment and self-control which his status as a physician and surgeon implies; and on that assumption and by that standard his conduct must be tried.

As to the second question: The legislature gives to physicians and surgeons certain exclusive privileges. The legislature does this, not for the benefit of a specially favoured class, but because the public interest demands that persons exercising these privileges shall be competent persons

of good repute, fit to sustain the delicate and confidential relations in which such practitioners are in the course of their duty commonly involved. I therefore agree with the contention of Mr. Martin that the answer to this question turns upon the result of the inquiry whether the respondent's misconduct marks him as a person unfit to be intrusted with the privileges of his profession.

I regret to say that I cannot find any ground for disagreeing with the conclusion of the medical council on this question. The course pursued by the respondent from the first interview with McHarg down to the completion of the pretended operation (as shewn by the undisputed evidence) was not, in my opinion, that of a person having fit notions concerning the obligations associated with his privileged position as a physician and surgeon. And I cannot say that the council was wrong in thinking that his conduct placed him beyond the pale of discretionary lenity.

The proceedings being, in substance, ad vindicatam publicam, it is not, I think, in the absence of express words, to be taken that the legislature intended to grant the power to award costs.

IRVING, J., concurred.

MARTIN, J., gave reasons in writing for allowing the appeal and restoring the order of the council. As to costs, his judgment is as follows:—

As to costs, I do not think that the special kind of an appeal which came before my brother Morrison can, having regard to sec. 4 of the amending Act of 1904, come within the expression "trial and hearing" in sec. 100 of the Supreme Court Act. That, I think, refers to procedure in tribunals of first instance, especially as applied to this matter. By the original sec. 45 of the Medical Act of 1898, the appellate Judge had jurisdiction "as to costs," but by the amending Act of 1904 these words were left out, and I do not think the deficiency is supplied by the new expression "or make such other order in the premises as to the Judge may seem right." The case of In re Vancouver Incorporation Act, 9 B. C. R. 373, is a direct authority that an appeal to "a Judge of the Supreme Court" is to him as persona designata, and there can be no further appeal without further provision, which here, however, is made by the proviso in sec. 4.

As to the costs of the appeal at bar, I am of the opinion that sec. 100 applies to them, and consequently they will follow the event.

Appeal allowed without costs; MARTIN, J., dissenting as to costs.

BRITISH COLUMBIA.

(NEW WESTMINSTER.)

HUNTER, C.J. NOVEMBER 10TH, 1905.

CHAMBERS.

REX v. WILLIAMS.

Criminal Law — Summary Trial — Election of Prisoner — Absence of Preliminary Inquiry by Magistrate—Neglect to Inform Prisoner of Time of Next Sitting of Court—Conviction—Invalidity—Discharge of Prisoner.

Application by prisoner for writs of habeas corpus and certiorari to quash a conviction made by a stipendiary magistrate under Part LV. of the Criminal Code.

The affidavit of the prisoner stated that at the trial he was not told that he had the right to be tried by a jury, and that he did not plead guilty.

The affidavit of the magistrate set forth that before committing the prisoner to gaol he reduced the charge to writing, read it to the prisoner, put to him the question required by sec. 786, explained to prisoner that he was not obliged to plead or answer, but if he did so he would be committed for trial in the usual course; that the prisoner thereupon consented to summary trial and pleaded guilty.

J. H. Bowes, for the prisoner.

W. J. Whiteside, for the Crown.

HUNTER, C.J.:—This conviction is bad on two grounds. It appears that the magistrate did not hold the preliminary inquiry required by sec. 789 of the Criminal Code for the purpose of enabling him to decide whether or not the case should

be disposed of summarily, but simply asked the prisoner how he pleaded and offered him his election, and did not inform him as to the probable time of the sitting of the next Court of competent jurisdiction.

One object of the statute in requiring this preliminary inquiry is obviously to prevent there being a second prosecution of the accused on the same facts for any graver offence than that which the magistrate has power to try. For instance, if it had appeared here that there was really a robbery instead of a mere theft, the authorities might have felt compelled to prosecute for that offence, notwithstanding the conviction for theft. A second prosecution on the same facts is of course discreditable to the administration of justice when it can be avoided.

The second ground is also fatal. In omitting to inform the accused as to the probable time when the first Court of competent jurisdiction would sit, the prisoner was not given the requisite information to enable him to properly make his election. It is true the exact date could not be stated, but it would have been sufficient to have informed him that such court is held every spring at New Westminster.

It was argued that the prisoner suffered no real injustice, as the evidence was overwhelming to convict him of the theft. The answer is that no person can be adjudged a criminal and sent off to prison except according to law, and the safety of every person whether accused or not lies in repressing such looseness in criminal proceedure.

No costs and no action.

BRITISH COLUMBIA.

(VICTORIA.)

HUNTER, C.J. NOVEMBER 23RD, 1905.

TRIAL.

STAR MINING CO. v. BYRON N. WHITE CO.

Mines and Minerals—Trespass Workings—Following Veins — Evidence — Inspection — Conflicting Theories — Determination of Court.

Action for damages and an injunction in respect of the alleged taking of ore by the defendants from the Rabbit Paw and Heber Fraction Mineral claims owned by the plaintiffs.

E. P. Davis, K.C., S. S. Taylor, K.C., and C. B. Macneill, K.C., for plaintiffs.

E. V. Bodwell, K.C., and R. S. Lennie, for defendants.

HUNTER, C.J.:—The ore was admittedly taken from within the limits of the claims, but the defendants justify under the law governing their claims known as the Slocan Star and the Silversmith; that is to say, they allege that they are entitled to the ore as belonging to a vein, the apex of which is on their own claims, and which they have in due course of mining followed down into the plaintiff's ground.

The mountain on which the claims are situate looks towards the north, and the vein works backward with depth towards the south. The defendants sank a shaft from their 5th level, and worked thence westerly into the defendants' ground, as they contend, along their vein, and it is from this drift that most of the ore in question has been taken.

The plaintiffs contend that in so doing the defendants have not been pursuing the Slocan Star vein, but that this vein is cut off by what they term the Black Fissure, which extends from a point at or near the head of the shaft on the 5th level in a north-westerly direction to the point B. on the plan affixed to the defendants' model, and beyond into the slates.

At the trial a large mass of evidence was given in support of the respective theories, the plaintiffs contending that the Slocan Star vein was cut off as already stated by the Black Fissure, and the defendants maintaining that the Slocan Star vein continued around point B. to a point C. on the model, and connected with the Silversmith vein, which they were working at the same level, and in fact that the Silversmith and Slocan Star constituted one and the same vein.

Difficulties having arisen as to the selection of an indifferent engineer to inspect and report upon the condition and appearance of the workings, I considered it advisable to inspect them myself in conjunction with an engineer chosen by each of the parties, and counsel were invited to attend the inspection, which, however, they both agreed was unnecessary. The plan was adopted that each engineer was to point out and explain upon the ground the principal facts in support of his contention, and that the other was then to explain them from his point of view. The result was that as the connection of the two veins between points C. and D.-27 on the 5th level was not apparent to the eye, it was ordered that

such work should be done as would if possible shew the continuity of that vein through that distance.

This work having been done, and a second view having been had, I have come to the conclusion, after hearing further evidence and what was urged, that the defendants' contention is correct, and that the 5th level shews a continuous vein traversing the Silversmith and Slocan Star.

With respect to the origin of this vein I incline to accept the defendants' theory in preference to that of the plaintiffs. The former was that the remarkable curve which the vein takes at the point where the work was ordered to be done arises from the fact that the fissure passes around the nose of a large dyke of porphyry, which had long before in a heated condition . . . through the slates which there constitute the country rock in preference to traversing it, the porphyry being a much harder and denser material than the surrounding slates; and I do not consider that the theory is weakened by the fact that the fissure does traverse small tongues of that material. The defendants' theory was that the "Black Fissure" cutting off the Slocan Star vein was caused by the contraction of the heated porphyry, but it seems difficult to reconcile this with the fact that small tongues of porphyry are found cut by the fissure, and that spathic iron or siderite, which is found close to the porphyry, cannot exist in the presence of any considerable degree of heat. However this may be, I do not think I am called on to definitely decide as to the correctness of either theory, as I consider there is abundant confirmatory evidence of the contention that the Silversmith and Slocan Star veins constitute one and the same vein.

Mr. Elemendorf, the defendants' engineer, pointed out several places in the east portion of the 5th level, which is admittedly on the Slocan Star vein—notably three—one being at the face, the second in the rise 75 feet east of the cross-cut, and the third at the junction of the level and the cross-cut, where identically the same material and appearance is to be found as that which composes the barren portion of the Black Fissure, which Mr. Sizer, the plaintiffs' engineer, admitted to be the case. And although he admitted that there were many spots in the different levels of the Slocan Star which were barren and composed of the self-same material as the Black Fissure, he maintained there was less evidence of crushing movement in the Star vein than in the

Fissure, but I do not see how any distinction can be based on this ground alone to differentiate different portions of a vein which is continuous in fact. It is true that at one or two points, notably at and beyond B., the material composing the vein and the adjoining slates appeared to be more compressed, shattered, and contorted than usual, but I think this was to be expected owing to the sharp curve taken by the fissure and the weight of the superincumbent mass of porphyry.

Inspection of the 5th level disclosed the fact that ore is found between stations 19 and 20 as well as all around the "horse" or shaft (i.e., where the vein widens out at the western boundary of the Slocan Star and commences its north-westerly course in the Heber Fraction); and also for a distance of 280 feet from the shaft as far as station 27, that is to say, for 280 feet in the Black Fissure, and there is nothing to distinguish this ore from that in the Slocan Star vein. Mr. Sizer explained the existence of ore in this 280 feet by saying that for a distance of 80 feet up to the cross-cut it was the Slocan Star vein broomed out, as it were, and butting up against the Black Fissure; and that as for the next 30 feet, there is little or no trace of ore, but from that on to the up-rise in the Rabbit Paw ground, a distance of about 40 feet, ore is found to occur; that these circumstances point to the existence of another vein separate from the Slocan Star vein, and also cut off by and traversing out against the Black Fissure; and, in explanation of the fact that ore is found in the remaining 90 feet up to station 27, invokes the theory of drag ore, or suggests that the Black Fissure has been mineralized for that distance. I have, therefore, on the one hand the contention that the presence of ore for this 280 feet indicates continuity of vein, and, on the other, a theory which has little to commend it except the ingenuity born of despair, and which the fact that the ore is found over the entire width of the vein is of itself sufficient to demolish.

Certain places were visited which Mr. Sizer claimed supported his theory, and would demonstrate it if exploratory work were ordered to be done. Mr. Sizer contended at the trial that evidence could be found at the angle of the stope near station 19, about 25 feet above the 5th level, in support of his theory of cut off, but a shot having been put in, since the trial, has wiped out any appearance of junction or cut off. In the stope above, where Mr. Sizer contended at the trial a

similar appearance could be observed, the ore has dropped down since the trial and shews the vein continuing on the course shewn by exhibit 70, and has also uncovered a clear hanging wall of porphyry. At the west face of the intermediate above No. 5 level there was before the trial an angle as shewn in exhibit G., and Mr. Sizer contended that if this were removed a clean cut off would become apparent. Work has been done and the level continued for a distance of 23 feet, with the result that the vein appears to proceed in the course shewn in exhibit 71; and there is a good ore body now shewing in the face. In presence of this debacle all that Mr. Sizer could suggest was that the level was not run far enough, and that the vein might be 70 or 80 feet in width, and that it broomed out in the same way as below. There was also a place in the angle of the intermediate below Five, where Mr. Sizer stated at the trial that a crack 18 inches in depth was to be seen, which supported his contention that the Black Fissure cut off the vein and proceeded on beyond; but this spot was not then open to examination, as the shaft was full of water.

Silversmith level No. 4 was then examined. This is entered through a horizontal tunnel which penetrates the nose of the dyke for about 50 feet, when vein matter in place becomes observable, and at a distance of 126 feet Mr. Elmendorf pointed out ore, and it was sworn at the trial that ore was found nearer the mouth of the tunnel by a distance of about 50 feet. I have no doubt that this tunnel simply cuts through a downward bulge in the porphyry, and that if it had followed this bulge it would have followed ore or vein matter all the way in from the exit.

The outcrop was next inspected, where a series of pits (over 50 in a distance of about 1,300 feet) had been dug shewing the apex rounding the dyke, its lowest point being at the nose of the dyke. Mr. Sizer candidly admitted that he could not dispute the fact that the Silversmith vein continued its way easterly around the point of the dyke, but that at a short distance east of the mouth of the tunnel, it was intercepted by the Black Fissure. He could not, however, pretend to fix the exact place, nor to say which pit was the most easterly of the Silversmith outcrop, or which was the most westerly of the Slocan Star. In fact, such a feat was obviously impossible, for the simple reason that in all the pits identically the same vein matter was visible. Evidence was

given at the trial that ore in place had been found in the top of pit 19, i.e., the mouth of the shaft which communicates with the fifth level, and this was not successfully impeached by the plaintiffs. The significance of the fact that ore in place is to be found in and near pit 19 lies in the circumstance that this pit is, roughly speaking, the corresponding point on the apex to the middle point of the Black Fissure as it appears in the 5th level.

The work ordered to be done between C. and D.-27 was inspected in May last, and the locus shewed in places a clearly defined hanging wall and the characteristic vein filling present in the Silversmith and Slocan Star veins. Mr. Fowler, the engineer who attended on the inspection on behalf of the plaintiffs in the absence of Mr. Sizer, stated that he was unable to see how this wall could be connected with the hanging wall of the Slocan Star vein, and no doubt it would be difficult for a stranger on a cursory view to be satisfied that there had been any connection by reason of the curvature and width of the workings at this point (the former drift having cut diagonally across the hanging wall), and by reason of the fact that the hanging wall throughout this portion of the vein frequently changes its dip, and that, as already stated, the slates around the point of the dyke are much contorted and shattered.

Inspection in presence of Mr. Elmendorf and Mr. Fowler was also had of the place in the intermediate below Five not accessible on the former inspection, where Mr. Sizer had discerned a crack, and which he claimed if opened up would shew the Black Fissure cutting off the Slocan Star vein. I am satisfied that this is a mere slip in the vein filling, and that it is only one of a number of such instances in the mine. I might add that ore occurs here and there in this level west of the shaft, the last occurrence being about 125 feet from the shaft, and about 12 feet from the face.

This second inspection having been had, further evidence was heard in July last, and the only matter developed which calls for any comment was that Mr. Sizer seemed to be uncertain as to what width he would assign to the butt-end of his so-called No. 2 vein, and as to what portion of the ore found in the alleged Black Fissure he would call drag ore.

Lastly, it should not be overlooked that the fact that this so-called Black Fissure was followed up unerringly for a distance of over a thousand feet without cross-cutting into the

adjoining rocks as far as point B., is a strong argument to shew that the defendants were successfully following the Slocan Star vein in its various turnings—an argument which can only be better appreciated by one who has been underground and seen the locus in quo.

Much stress was laid upon the fact that the Black Fissure as seen on the 5th level, was barren for over 1,100 feet, but in my opinion there is nothing in this to militate against the contention for continuity. Other instances of veins being barren for long distances were cited, and there is nothing to guarantee that this portion of the 5th level may not improve with depth, until a point is reached when the ascending solutions were less subject to the influence of the overhanging porphyry, and there is, however, the difficult fact to contend with that, as already stated, assay ore was found in pit 19.

I was accordingly at the close of the evidence of the opinion that this so-called Black Fissure is a myth, and that the Slocan Star and Silversmith veins constitute one and the same vein. After the evidence was closed, Mr. Davis applied for an order that further work be done, on the ground that not enough had been done to establish his theory, and that without fresh work it was useless for him to continue, and said that there was no object in arguing the case as it stood, and that unless more work was done, the case was practically settled. As I was satisfied on what I had already seen and heard that his theory was false and could not be demonstrated to be true, I refused the application, but left the question open until after I had heard argument on the whole case. The argument was fixed for 6th November last, but on that day Mr. Macneill appeared for the plaintiffs and informed the Court that he was instructed merely to formally renew the application, which being formally refused, he withdrew from the proceedings.

Nothing, then, having been urged by Mr. Macneill as to why I should change my opinion and order further work done, I remain of that opinion, and consider that it would be only imposing a serious burden on the defendants without any advantage to the plaintiffs if I were to order any more work to be done in support of a theory which did not keep its original form, but grew with the litigation, and from time to time shewed great elastic powers in accommodating itself to the facts.

There is, therefore, nothing left for me to do but to dismiss the action with costs.

Mr. Bodwell pressed for a declaration as to the nature and extent of the rights of his clients, but, as there is no counterclaim praying for such a declaration, it is not open to me to make one. Even if there were, it would not necessarily be incumbent on me to do so. As matters stand, the dismissal of the action determines all the issues in favour of the defendants.

BRITISH COLUMBIA.

(VICTORIA.)

DUFF, J. NOVEMBER 27TH, 1905.

CHAMBERS.

WALLACE v. FLEWIN.

Mines and Minerals — Water Clauses Consolidation Act — Water Record — Grant by Commissioner — Subsequent Amendment—Nullity—Review—"Decision of a Commissioner."

Petition under sec. 36 of the Water Clauses Consolidation Act, 1897, for cancellation of a water record issued to one Keith in February, 1905, and afterwards in March, at Keith's request, amended to read as granted to Keith and Hamilton.

E. V. Bodwell, K.C., and W. E. Oliver, for petitioner.

W. J. Bowser, K.C., for respondents.

DUFF, J.:—By sec. 2 of the Water Clauses Consolidation Act, "record" is defined to be "an entry in some official book kept for that purpose."

Prior to the amending Act of 1905, the Commissioner, having adjudicated upon an application for a record, and having made the appropriate entry, was, in my opinion, functus officio. If under the law as it then stood, the Commissioner had power to amend a record, it must have been by virtue of some implication capable of being derived from

the provisions of the Act; and moreover—as there is nothing in those provisions restricting the mode of its exercise—such a power, if it existed, must have been exercisable by the Commissioner, after any lapse of time, with or without notice to persons whose rights might be affected, and indeed ex mero motu suo. The effectual exercise by the Commissioner of the powers expressly conferred by the Act does not depend upon the existence of any such subsidiary power; and there is therefore no ground for holding that it was impliedly given. The amending Act of 1905 confirms this view.

Consequently, what the Commissioner did in March—being extra fines mandati, and a nullity—cannot by virtue of sec. 36 be reviewed in these proceedings as the "decision of a Commissioner" under this section.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. OCTOBER 3RD, 1905.

CHAMBERS.

RE SASKATCHEWAN LAND AND HOMESTEAD CO.

Registry Laws—Land Titles Act—Fees of Registrar—Registration of Injunction Order after Caveat.

Reference by the registrar of the Northern Alberta Registration District under sec. 111 of the Land Titles Act, 1894.

S. E. Bolton, Edmonton, for the Saskatchewan Land and Homestead Company.

D. J. MacNamara, Edmonton, for the registrar.

SCOTT, J.:—The Saskatchewan Land and Homestead Company filed with the registrar a caveat which appears to have affected a large number of parcels of land, as the registrar's fees thereon amounted to $56. The company afterwards instituted an action in the Supreme Court to enforce the claim set out in the caveat, and before the caveat expired

obtained an injunction or order restraining the registrar from dealing with the lands included in the caveat. Upon tendering the order for registration the registrar claimed $56 for his fees thereon, which amount was paid by the solicitors for the company under protest.

The only items of the tariff of registrar's fees which are applicable are the following:

11. "For registering or filing any mechanic's lien, certificate, order, or decree of a Court or Judge, or any assignment or discharge wholly or partially of a mortgage, incumbrance, or charge, or a satisfaction of an annuity, or any other instrument affecting land other than those particularly specified in this tariff, including all memoranda, searches, and other services connected therewith. . . . . $1.00."

12. "When any instrument registered deals with or affects lands in more than one certificate of title, for each memorandum after the first memorandum. . . . . .50."

14. "For filing each caveat and for preparing and mailing the notices in connection therewith 2.00."

In my opinion, the registrar is entitled to the fees specified in items 11 and 12 of the tariff. The injunction is an order within the meaning of item 11, and the term "instrument" in item 12 is intended to include all documents of the nature specified in item 11. This is evidenced by the fact that in the tariff the words "(see however item 12)" appear at the end of item 11. In addition to this, that term appears to be wide enough to cover such an order, as it is "a document in writing affecting the transfer of or other dealing with land" (see sub-sec. k of sec. 2 of the Act, as amended by 61 Vict. ch. 32, sec. 2).

It was contended by counsel for the company that the orders mentioned in item 11 were intended to be confined to orders changing title, such as vesting orders, and that it was not intended to include orders which have the effect merely of continuing caveats; that there is no provision for filing such orders; and that it is unnecessary to register the same.

In my view, it is necessary to make a memorandum upon such certificate of title of the fact that such an order has

been made, otherwise the registrar upon referring to the register and finding that a caveat had been filed, and that there was no entry of any proceedings having been taken within the time limited by the Act to enforce the claim set forth in it, he would, I think, be justified in assuming that the caveat had lapsed.

I have no means of ascertaining the amount to which the registrar is entitled to charge under items 11 and 12 for filing the order in question.

NORTH-WEST TERRITORIES.

(NORTHERN ALBERTA.)

SCOTT, J. OCTOBER 3RD, 1905.

CHAMBERS.

RE GREENSHIELDS CO.

Registry Laws — Land Titles Act — Mortgages—Priorities—Production of Certificate of Title.

Reference by the registrar of the Northern Alberta Land Registration District under sec. 111 of the Land Titles Act, 1894.

O. M. Biggar, Edmonton, for the Greenshields Company and for Short, Cross, & Co., solicitors.

F. C. Jamieson, Strathcona, for Robert Ritchie.

SCOTT, J.:—It appears from the reference that on 29th December, 1903, the registrar received from the solicitors of the Greenshields Co., Limited, a mortgage made by A. Davies to that company upon lots 21 and 22, block 81, Strathcona, together with other lands. This mortgage was then registered as to the other lands, but was not registered as to lots 21 and 22, because the certificate of title to those lots was not then produced, it being then in the possession of the Dominion Permanent Loan Company of Toronto, which held a prior

mortgage on those lots. At the time the Greenshields mortgage was produced, the registrar wrote to the Dominion Permanent Loan Company to send the duplicate certificate for registration purposes.

On 1st February, 1904, the registrar received from Messrs. Short, Cross, & Co., solicitors, a mortgage in their favour upon lots 21 and 22 and other lands.

On 22nd February, 1904, the registrar received from the Dominion Permanent Loan Company the duplicate certificate of title to lots 21 and 22, accompanied by a letter from the company stating that it had been forwarded at the request of Messrs. Rutherford & Jamieson, solicitors, of Strathcona.

On the same day the latter firm handed in for registration a mortgage upon those lots and other lands to Robert Ritchie.

The question submitted is: Which of these mortgages should be registered first?

Although not so stated in the reference, it appeared to be conceded upon the argument before me that Messrs. Rutherford & Jamieson, who are practising advocates in Strathcona, in procuring the transmission of the certificate of title to the registrar, were acting as solicitors for Ritchie.

In view of sub-sec. 2 of sec. 33 of the Act, the registrar could not receive any of these mortgages for registration as to lots 21 and 22, unless accompanied by the duplicate certificate of title to those lots. The fact that the mortgages to Greenshields Co. and Short, Cross, & Co. comprise other lands, for which a duplicate certificate of title was produced, obliged him to receive, enter in his day book, and register them in so far as they related to other lands, but he could not be taken to have received or entered them in so far as they related to lots 21 and 22, even although he received them and filed them in his office; in my view, his duty was to treat them as mortgages upon the other lands alone.

If I am correct in this view, a question to be considered is, whether they should be held to be in his hands as mortgages upon lots 21 and 22 immediately upon the receipt by him of the duplicate certificate of title to those lots, without regard to the person by whom or at whose instance it was produced.

In my opinion, the subsequent production to him of the duplicate certificate by or on behalf of another person than

those mortgagees, and for a purpose other than the registration of those mortgages, would not have that effect. What leads me to that conclusion is, that there is not, or at least there should not be, on the page of the register relating to lots 21 and 22, or elsewhere in any of the registrar's books, any entry or memorandum to shew that any mortgage on these lots was on file in his office, and it is absurd to suppose that he should depend upon his recollection alone as to such being the case.

There can be no doubt that the duplicate certificate was produced at the instance of Ritchie for the purpose of procuring the registration of his mortgage, and he, being the first to apply for registration after its receipt, is, in my opinion, entitled to priority, and I therefore hold that his mortgage should be first registered.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. NOVEMBER 18TH, 1905.

TRIAL.

EASTERN TOWNSHIPS BANK v. DRYSDALE.

Interpleader by Sheriff—Judgment Debtor as Claimant—Seizure of Building under Fi. Fa. Goods—Annexation to Freehold—Exemptions Ordinance—Homestead Exemption—Workshop.

An interpleader issue.

Giffard Elliott, Yorkton, for the execution creditors.

W. R. Parsons, Yorkton. for the claimant.

WETMORE. J.:—The facts of this case are practically undisputed. The defendant and claimant are one and the same person. The deputy sheriff, under a fi. fa. goods against defendant, seized a blacksmith shop in his occupation. This building was not occupied by defendant as a residence, merely as a blacksmith shop. It is of the value of about $500. The

lumber of which the building was constructed was furnished by one Fulton, defendant doing the work upon it himself, and Fulton was to own the building until the lumber was paid for. This lumber has not been paid for yet. Neither defendant nor Fulton owns the land upon which this property is situated. Defendant rented it from one Kerr from year to year. Kerr did not lease to defendant the whole lot of land, but only the portion of it upon which the blacksmith shop stood. Near to this blacksmith shop there was a drive-shed belonging to Kerr, which undoubtedly formed a portion of the freehold. For the purpose of constructing a bin in which to store coal, defendant boarded up the space between the drive-shed and his blacksmith shop, attaching the boards to each side of his shop and the drive-shed. Apart from this attachment to the drive-shed, the blacksmith shop merely rests on blocks placed on the ground; it is not let into the ground at all. Defendant owns no other property, unless possibly the tools of his trade, which are in this shop.

It is contended, first, that this blacksmith shop is exempt from seizure under execution by virtue of clause 10 of sec. 2 of the Exemptions Ordinance, R. O. ch. 27; second, that being real property it is not liable to seizure under a fi. fa. goods.

It is urged on the part of the execution creditors that defendant has no locus standi to claim this property, because the title to it belongs to Fulton. In view of the conclusion I have reached, it is not necessary to decide the latter question.

Assuming that defendant has a possessory right which would be liable to seizure under a proper execution, I am of opinion that the question whether this property is liable to seizure under an execution against goods cannot be raised by interpleader. This is an interpleader by the sheriff, and there are just four specified cases in which he may interplead, as provided by clause 2 of Rule 431 of the Judicature Ordinance, and those are where the claim is made by " (a) any person other than the person against whom the process issued; (b) any landlord for rent; (c) any second or subsequent execution creditor claiming priority over any previous judgment, execution, process, or proceeding; (d) the execution or attachment debtor claiming the benefit of any exemptions from seizure allowed by law."

Therefore, these interpleader proceedings can apply only in so far as the claimant's claim respecting the exemption

from seizure is concerned. As to the question whether this property is exempt from seizure under the Exemptions Ordinance, clause 10 is certainly not as clear as it might be, and its language is entirely different from that of the Manitoba statute. I have come to the conclusion, however, that this building is not exempt. Clauses 9 and 10 of sec. 2 of this Ordinance seem to me to have been passed with the object of providing a home for execution debtors "so as to give to them shelter beyond the reach of financial misfortune," as set out in 15 Am. & Eng. Encyc. of Law, p. 526. And I read the words "the house and buildings," in clause 10, as meaning the house which is the residence of the debtor and the buildings used in connection with such house. I regret to say I have not been able to lay my hand upon any authority directly in point which would guide me in reaching this conclusion, and I am entirely governed by what I find laid down in such text books as I could lay my hand on with respect to the exemption of homesteads and residences from seizure under execution.

The result is that the claimant will be barred. Plaintiffs will pay to the deputy sheriff his costs of interpleader proceedings, and the claimant will pay to plaintiffs their costs of interpleader proceedings, including the costs so ordered to be paid to the deputy sheriff. No action to be brought against the deputy sheriff.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. NOVEMBER 24TH, 1905.

TRIAL.

ROBINSON v. BOYD.

Sale of Goods—Warranty—Breach—Damages.

Action for damages for breach of a warranty.

E. L. Elwood, Moosomin, and B. P. Richardson, Grenfell, for plaintiffs.

E. R. Wylie, Moosomin, for defendant.

WETMORE, J.:—No question of law is involved in this case. It is entirely a question of fact, and I find the follow-

ing facts: the horse in question, at the time of the sale and of the warranty sued upon, was not sound, he was afflicted with chronic inflammation of the testicles and the spermatic cord; he was so afflicted in the season of 1902 when travelled in Ontario, and by the time he was sold to plaintiffs the affliction became more acute and he was unable to foal 65 per cent. of good productive mares; he was practically useless as a stallion; and this affliction could not have been remedied by any amount of good care and proper grooming; the defect was inherent.

The result, therefore, is that plaintiffs are entitled to recover. The measure of damages I hold to be the difference between the contract price, which was $3,000, and the actual value at the time of sale, not the actual value now, and interest at 5 per cent. from the date of sale, which was 17th March, 1903, and the amount paid for grooming and care of the horse down to the time that plaintiffs discovered that he was of no practical value as a stallion, which I put at 2nd June, when Dr. Elliott examined the horse and reported. The evidence shews that $20 was paid to Beswetherick for one month's grooming, and Brennan had him from the expiration of that month down to 2nd June, but the amount of wages paid him is not satisfactorily established; Mr. Thorburn thinks it was $50, but "thinking" will not do. I will assume, therefore, that he was paid the same as Beswetherick, that is, $20 per month. I find the value of the horse at the time of the sale to be $150. The damages, therefore, will be $3,000, less $150, or $2,850, and interest from 17th March, 1903, to 24th November, 1905, at 5 per cent., $382.75. And the care and keep from 17th March, 1903, to 2nd June, 1903, at $20 per month, will be $50.65.

There will, therefore, be judgment for plaintiffs for $3.283.40 and costs.

NORTH-WEST TERRITORIES.

(SASKATCHEWAN.)

PRENDERGAST, J. NOVEMBER 28TH, 1905.

TRIAL.

MACPHERSON FRUIT CO. v. HAYDEN.

LANG MANUFACTURING CO. v. HAYDEN.

BROWN v. HAYDEN.

LESLIE v. HAYDEN.

Attachment of Debts—Moneys Due under Mortgage—Instalments Falling Due after Service of Garnishee Summons—Priorities—Judgment Creditors—Transferee of Mortgage—Assignee of Mortgage for Benefit of Creditors.

In these 4 actions judgments had been recovered against the defendant, and applications made to garnish moneys alleged to be due to the defendant by W. L. Jones, garnishee, which were also claimed by the Canadian Elevator Co. and by F. M. Brown, assignee of defendants under an assignment for the benefit of creditors.

PRENDERGAST, J.:—In these 4 actions the defendant, the garnishee, and the claimants are the same, and the present proceedings are brought to have the liability of the garnishee determined under Rules 390 and 392 of the Judicature Ordinance.

The garnishee is the mortgagor and the defendant is the mortgagee in a certain mortgage dated 23rd July, 1904, for $700, payable as follows: $200 without interest on 1st November, 1904; $150 with interest at 6 per cent. on 1st April, 1905; and $350 with interest at the same rate on 1st November, 1905.

The plaintiffs have recovered judgments for the following amounts respectively (in the order of the cases as above set forth), $113.34, $77.06, $43.37, and $193.35.

The plaintiffs in the two first cases (MacPherson Fruit Company and Lang Manufacturing Company) each issued two garnishee summonses after judgment, which were duly served; one on 8th March, 1905, and the other on 8th May, 1905, in each case. The other two plaintiffs (Brown and Leslie) also issued garnishee summonses after judgment, which were served on 22nd May, 1905, in each case.

The garnishee, being served as above, paid into Court $200, being the amount of the first instalment due on the aforesaid mortgage.

The Canadian Elevator Co. claim by virtue of a transfer of the said mortgage, which said transfer from defendant to them bears date 14th December, 1904. There was at the time $162 due the company for building material, and they were threatening to register a mechanic's lien against defendant's property, when they obtained the transfer. There is no allegation that the transfer is fraudulent or preferential.

Brown claims by virtue of an assignment for the benefit of creditors made by defendant to him on 23rd May, 1905.

The MacPherson Fruit Company and Lang Manufacturing Company's garnishee orders having been served on the same day, and they being represented herein by the same counsel, who did not make it appear who had priority as between the two, I will deal with them as occupying the same rank.

As so with Brown and Leslie as between themselves.

On the above facts, it seems clear to me that the Canadian Elevator Co. must take priority by virtue of the transfer of mortgage, but only to the extent of their claim, $162. If the transfer is operative at all as to the balance of the mortgage money, the Elevator Company are only the defendant's trustees with respect thereto.

The MacPherson Fruit Company and the Lang Manufacturing Company should rank next by virtue of their garnishee summonses served on 8th March, and are entitled to share pro rata of their judgments the balance of the moneys in Court, being $38.

Without speaking of their respective garnishee summonses served on 8th March, they are, morevover, entitled by virtue of their respective summonses served 8th May, to judgment against the garnishee for the second instalment then overdue on the mortgage, $150.

This, however, does not wholly satisfy their claim. What about instalments falling due on the mortgage after service of the garnishee summons?

In my opinion the whole debt secured by the mortgage was attached; and, subject to the Canadian Elevator Company's claim, the MacPherson Fruit Company and the Lang Manufacturing Company secure first rank with respect thereto.

An attachable debt is one debitum in præsenti even if only solvendum in futuro: Ann. Prac. 1905, O. 45, r. 1, p. 633.

In Webb v. Staunton, 11 Q. B. D. 518, which was an application by a judgment creditor for an order attaching a debtor's share of the income in the hands of trustees, it appeared that the last half-yearly payment had been made, and that there was no money proceeds of the trust property in the hands of the trustees. It was held that there was no debt owing or accruing. But the circumstances were such that the trustees might never owe anything. It was possible that, through failures or other causes, no more money might ever come into the hands of the trustees, and then there would never be any debt at all on their part.

Here, the reverse is the case. The debt is not a contingent one, not dependent on any future event. It is all due to-day, although solvendum only in futuro.

The MacPherson Fruit Company and the Lang Manufacturing Company have then also a right to judgment against the garnishee for such part of the instalment of mortgage due 1st November, 1905 (although the same fell due subsequent to service of the garnishee summons) as is necessary to satisfy the balance of their claim.

Subject to the above, Brown and Leslie have also a right to judgment pari passu by virtue of their garnishee summons, and lastly Brown, as assignee for the benefit of creditors, takes the balance.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. DECEMBER 9TH, 1905.

TRIAL.

O. W. KERR CO. v. BURKMAN.

Promissory Notes—Action on by Assignee of Administratrix of Holder — Transfer after Maturity — Set-off of Claims against Estate of Holder—Services—Account—Evidence.

Action upon promissory notes.

E. R. Wylie, Moosomin, for plaintiffs.

E. L. Elwod, Mosomin, for defendant.

WETMORE, J.:—This action was brought by plaintiffs as the assignees of several promissory notes held by the estate of the late George E. Nugent, deceased. The defence set up is that defendant, before the notes were assigned, performed work and furnished materials for Nugent and his estate, and that the representative of the estate received a quantity of wheat and oats which were to be applied on account of his indebtedness to the Nugent estate. It is conceded that these notes were assigned to plaintiffs after maturity. It does not appear either by the pleadings or by the testimony how the notes sued on were assigned to plaintiffs; that is, whether by indorsement on the notes or by an assignment in writing not written on the notes. It has occurred to me to question whether this is a negotiation within the meaning of sec. 32 of the Bills of Exchange Act, 1890, and therefore whether defendant's claim against the Nugent estate for work and material furnished was an equity which attached to the notes in the hands of plaintiffs, but, as the question was not raised, and it seemed to be conceded that defendant would be en-

titled to be credited with whatever claim he had against the Nugent estate at the time of the assignment of the notes, I do not consider it necessary to express any opinion upon the subject. I take it for granted that the counsel for defendant considered that the note was not negotiated within the meaning of the Act referred to, and that therefore plaintiffs took the assignment of the notes subject to the same claims that the defendant might have if these notes had been a chose in action. The evidence establishes quite clearly that defendant performed work and furnished materials for George E. Nugent in his lifetime and for his estate since his death to the value of $16.95. The fact that defendant filed no claim with the administratrix for this indebtedness is not material; first, because there is no evidence that any order had been made or notice given for creditors to file claims; and in the next place, defendant was not a creditor of the Nugent estate at the time that Nugent died, that is, he owed the estate more than the estate owed him, and it was time enough for him to set up his claim when the estate proceeded against him, if the estate omitted to give him credit for what set-off he might have.

The difficulty that arises in this case in as to the arrangement or bargain that was made with respect to a crop grown upon some land that Nugent had rented from one Wrightson, and upon which the growing crop was sold to defendant. The lease from Wrightson and the sale to defendant and the terms thereof were not disputed, but the evidence as to the quantity of grain grown on this land and whether defendant's portion was received by the representative of the Nugent estate to be applied on account of the defendant's indebtedness to the estate, and what was received, is of a very contradictory character. The terms on which Nugent rented this property were that Wrightson was to have one-third of the crop grown on it. It is clear that Nugent's rights with respect to this property were sold to defendant for $150. The quantity of grain grown has not been very satisfactorily established, and I am to some extent left to grope to find out what that quantity was; the testimony of Millhen, the thresher, has governed me in arriving at the quantity of wheat; according to him there were 502 bags of wheat which would average 2¼ bushels to a bag; that would make 1,129 bushels and 30 lbs. of wheat. In the view I take of this case,

it is not necessary for me to say anything with respect to the quantity of oats that was grown on this place. Out of the 1,129 bushels and 30 lbs. of wheat the thresher took 157 bushels and 30 lbs. for his services; that left 972 bushels of wheat; of that Wrightson was entitled to one-third, or 324 bushels, which left 648 bushels to defendant, and out of that 648 bushels defendant took 62 bushels, which left 586 bushels in the granary or buildings on that farm belonging to defendant. Defendant's contention is, that Rawson, who was acting as the agent of the Nugent estate, agreed to accept all this wheat and give him credit for it on account. Rawson denies that; he contends that he only consented to haul this grain in at defendant's request, and without assuming any responsibility. I have come to the conclusion that defendant's version of the transaction is the correct one, and I accept it. Rawson certainly dealt with this wheat in a manner which to my mind indicates that he intended to keep control of it and handle it for the benefit of the Nugent estate. He undertook to haul the grain or have it hauled; he employed men to haul it and paid them for doing so; and he received moneys, the proceeds of the sale of the grain, and applied them to defendant's indebtedness to the estate; but plaintiffs failed at the trial to shew that Rawson accounted for what would represent the price of 586 bushels of wheat at the market price going; an attempt was made to do so, but the evidence was not of a character which was admissible. I hold, therefore, that defendant is entitled to be credited with 586 bushels of wheat at the market price at the time, less the price of hauling, which was 10 cents a bushel. I put the wheat at 45 cents a bushel; that is the nearest I can come to it under the evidence. 586 bushels at 45c. a bushel would amount to $263.70, and that amount, less $58.60, the price of hauling, would be $205.10, which, together with the $16.95 for work and materials furnished, amounting in all to $222.-05, must be credited against defendant's indebtedness to the Nugent estate.

Defendant swore that the second note set out in the statement of claim, namely, the one for $187.10, was made up of the $150 which he agreed to pay for Nugent's interest in the rented property and the crop and a small amount of $37.10 that he owed for store account to the estate, and he also swore that his store account did not exceed this $37.10. This

was entirely erroneous; the $150 is not included in this note at all; a separate note was given for that, which note is not assigned to plaintiffs, and the Nugent estate holds it yet. As a matter of fact the $187.10 note was entirely made up of goods furnished, about $122 of which was a store account. I think this is a very extraordinary mistake for defendant to have made, and it has gone a long way to impeach his credibility with me; to say the least, his memory must be of a very defective character and very unreliable.

With respect to the oats grown on this place, defendant sets up that Rawson at the time he agreed to accept the wheat, as I have found he did agree to do, also agreed to accept the oats and credit them in the same way. Rawson absolutely denies that, and asserts that the oats, with the exception of about 89 bushels, were sold by defendant to one Meter, and that 89 bushels were sold to him (Rawson) on his private acount. I accept Mr. Rawson's statement as to the oats. I am free to confess that I am influenced largely in coming to this conclusion by the extraordinary testimony given by defendant with respect to the $187.10 note, and, apart from defendant's own testimony, there is no conduct on the part of Rawson which points out a dealing with the oats in the same manner in which he dealt with the wheat.

I am satisfied that if there is any indebtedness from defendant to the Nugent estate now outstanding, the proceeds of the wheat should first be applied to that indebtedness before applying it to the indebtedness sued upon in this action. This was practically conceded by the counsel for defendant. Now, there is such an outstanding indebtedness, namely, the $150 given as the consideration for the purchase of the leased property and crop by defendant. Rawson swore that he applied what moneys he actually received on account of this wheat to this $150 note, and I find that to be the fact. But for the purposes of deciding this case we will call the $150 note an outstanding indebtedness. It makes no difference. Deducting this $150 from the $222.05 before referred to, leaves a balance of $72.05 to be applied to the indebtedness now sued on. I will take the first note mentioned in the statement of claim, $70.66, and add the interest payable by the terms of the note

down to maturity, $6.42, making in all $77.08, and deducting this $72.05 leaves a balance of..$ 5.03

And interest on that at 5 per cent. from 4th November, 1901, to 9th December, 1905, is.	1.02	
leaving a balance due on this note of....		$ 6.05
The second note mentioned in the claim is for. . . . . .$ 187.10		
The interest on that from 4th November, 1901, to 9th December, 1905, 4 years, 1 month, and 5 days, at 5 per cent., is....	38.30	225.40
The third note is for.....$ 43.74		
Interest on that to 4th November, 1901, at 12 per cent., is	3.98	
And interest from 4th November, 1901, to 9th December, 1905, is	11.11	58.83
The fourth note is for .....$ 12.00		
And interest from 4th December, 1900, to 9th December, 1905, at 12 per cent., 5 years and 5 days	7.22	19.22
The fifth note is for .....$ 14.16		
And interest from 4th November, 1901, to 9th December, 1905, 4 years and 5 days, at 5 per cent.....$	2.85	17.00
Making in all.		$326.50

There will, therefore, be judgment for the plaintiffs for $326.50 and costs.

YUKON TERRITORY.

CRAIG, J. NOVEMBER 13TH, 1905.

CHAMBERS.

RE YUKON DOMINION ELECTION.

GRANT v. THOMPSON.

Parliamentary Elections — Controverted Election Petition — Preliminary Objections—Status of Petitioner—Proof of—Copy of Voters' List Certified by Clerk of the Crown in Chancery—Absence of Notice under Canada Evidence Act —Refusal to Receive Copy as Evidence — Petition Filed before Return by Returning Officer—Effect of — Form of Petition—Affidavit.

Further hearing of preliminary objections by the respondent to a petition filed by John Grant against the return of Alfred Thompson as member of the House of Commons of Canada for the electoral district of the Yukon Territory. See ante 136.

George Black, for the respondent.

F. J. McDougal, for the petitioner.

CRAIG, J.:—This election was held under 2 Edw. VII. ch. 37, being an Act respecting the representation of the Yukon Territory in the House of Commons. That Act provides, among other things, for the appointment of a returning officer and the proceedings on receipt of the writ, the fixing of the day of nomination by the writ, the publication of a notice fixing the place and time of nomination, the day for the taking of the poll, and the time and place when and where the returning officer will sum up the votes given for the candidates, and contains other provisions in regard to delay or accident.

In this case two candidates were nominated, the respondent and F. T. Congdon. The date fixed for the poll was 16th December, 1904. The date fixed for the summing up of the votes and the declaration of the election was 7th February, 1905. The petition in this case was filed and presented on 25th January, 1905.

Under the Election Act just cited enumerators are to be appointed, such enumerators to prepare a list of voters and 15 days before the polling day to post these lists up; after posting and 7 days before polling day the enumerator may, upon representations made to him, add a name or strike off a name from the list by entering them below his signature upon the list and initialling them. Two days before the polling day, as provided by sec. 32 of the Act, he shall write at the foot of the copy a certificate in form K. to the schedule, and, by sec. 32, he shall deliver, before 8 o'clock on the morning of the polling day, to the deputy returning officer for the polling division to which it relates, such list, "which shall be the voters' list for such polling division, subject to be further corrected on the polling day as hereinafter provided." By sec. 46 the poll clerk may make such additions, alterations, and erasures in the voters' list as the deputy returning officer directs him to make and as is required by any provision of the Act. So that it appears the voters' list, even as returned by the enumerator to the deputy returning officer, is not the final list, and cannot be taken as the final list used in the election, even at the time specified by sec. 33, which provides for the certificates of the enumerator two days before the election. What I wish to make clear is this, that the list, as used at the election, cannot be said to be the final voters' list until it is so used by the deputy returning officer on election day.

Preliminary objections were filed, which objections are, first, that the respondent, Alfred Thompson, was not at the time of the presentation and service of the petition herein a member of the House of Commons of Canada, and was not then a person against whom a petition complaining of an undue election or undue return could be presented under the said Act; second, that the said petition and proceedings herein did not complain of the undue election or undue return of a member, as required by the said Act; third, that the said respondent was not at the time of the presentation and service of the petition herein a person against whom an election petition could be presented under said Act; fourth, that the petition is not in any prescribed form and not in the form prescribed by the Dominion Controverted Elections Act, or by any Rules of Court, and is not in compliance with the said Act; fifth, that no affidavit by the petitioner, as required by sec. 7 of the said Act, as amended by 54 & 55 Vict.

ch. 20, sec. 3, has been presented with the said petition; sixth, that the alleged affidavit by the petitioner presented and served with the petition herein, does not in any way refer to the petition herein, and it does not appear that the petition referred to in the said alleged affidavit is the petition herein; seventh, that the said petitioner John Grant had not at the time he swore to the said affidavit any reasonable grounds for believing and did not believe that the material allegations in the said petition were true; eighth, much to the same effect as the seventh; ninth, that no notice of the presentation of the petition herein and of the security, accompanied with a copy of the petition, has been served on the respondent; tenth, that no notice of the date of the presentation of the petition herein has been served, as required by the said Act; eleventh, that the petitioner is not a person who had a right to vote at the election to which the said petition relates.

On the hearing of the preliminary objections, objections Nos. 7 and 8 were abandoned, and the remaining objections were relied upon.

The argument on the preliminary objections took place on 15th August of this year, and upon that argument no evidence was adduced of the status of the petitioner as a voter beyond the affidavit which is attached to the petition, which alleges generally that the allegations contained in the petition are true, one of the allegations (No. 2) being that the petitioner was entitled to vote and did actually vote at the said election. The petitioner relied upon this general affidavit; and upon the argument the Richelieu Election Case, 21 S. C. R. 168, was cited, as well as other cases upon the same point. I reserved my judgment upon the argument, allowing counsel to put in within two days any further authorities they might see fit. Apparently counsel for the petitioner upon reading the cases cited saw that he was in a difficulty and that these cases were strongly against him upon the status of the petitioner, and were to the effect that the status could not be proved in the manner in which he attempted to prove it. He thereupon applied to me for leave to give further evidence of status. Upon a motion being made on 22nd August I allowed the petitioner to give further evidence of his status and to re-open the argument, and further leave to file the list of the voters containing the

name of the petitioner, and for that purpose twenty days was allowed to communicate with Ottawa and have the necessary documents forwarded (ante 136); and on 20th September the matter was re-opened under the order and special leave. and a list was produced headed "List of Voters of the Electoral District of the Yukon Territory, Polling Division No. 3-C," certified to in the form required by the Election Act for the Yukon Territory, which I have cited, and signed by Edward Barbeau, the enumerator, dated 13th December, 1904, The certificate certifies that "the foregoing is a true copy of the voters' list in polling division No. 36 of the electoral district of the Yukon Territory as prepared by the enumerator for the use of the election of a member of the House of Commons for the said the electoral district, now pending." The heading of the list is "Polling Division No. 3-C." No notice was served under sec. 19 of the Canada Evidence Act regarding the use of any copy as evidence. The petitioner went into the box, and testified that his name was on the voters' list used on the day of the election; that he voted, but that some other person had voted before him on the same name; that he took the oath and upon that oath he gave a vote; that he was the John Grant named in the voters' list; and that the other person who voted under that name must have personated him, as he was the only John Grant corresponding to the description and to the address given, namely, the Fairview Hotel; that no other John Grant had lived at that place within the time limited by the Act. No evidence was given to shew that polling district No. 3-C was within polling division No. 36, as mentioned in the certificate, nor that polling division No. 36 was the right division.

Coming now to the certificate of the Clerk of the Crown in Chancery, the only certificate he gives is: "Certified true copy of original of record in my office. H. G. Lamont, Clerk of the Crown in Chancery." It will be observed that there is no certificate of the Clerk of the Crown in Chancery that this is a copy of the voters' list returned to him by the returning officer as being the one used upon the election day for the election and so returned. One cannot from the document itself say that this list was the list used at the election, nor can one say from any evidence which has been adduced that it is the list. In this connection I would refer to the case already cited, namely, the Richelieu Election Case, and

to the judgment of Mr. Justice Strong. From that judgment I draw this conclusion, that the onus of proving status as a voter to entitle one to petition is upon the petitioner; that, to establish his position, he must prove, not only that he was entitled to vote, but that his name was actually on the list used at the election; it is not sufficient to prove that he applied for a vote, that he was entitled to vote, that his name was on some revised list; but he must prove that his name was actually upon the list used upon the day of the election. He may prove this, I take it, either by the production of the original voters' list so used, or by the production of a copy properly certified. Can it be said that the list before me is properly certified or that the polling division is correctly and clearly set out? These lists came from Ottawa; I took the precaution to have them carefully sealed up and not opened until opened in court. When I asked for them I found that the clerk of the court had handed them out for some purpose or other without my consent and before my perusal of them. I assume they are in the same condition as when they arrived, but I find several lists headed in the same way, different polling divisions, 3-A, B, C, D, and so on, but not headed in any polling district or polling division, as the certificate of the enumerator certifies, his certificate saying that the list is a true copy of the voters' list in polling division No. 35, whereas the heading says polling division No. 3-C. There may have been some general certificate accompanying this list; if so, it is not now produced. I think the certificate of the Clerk of the Crown in Chancery should have set out and certified that the list is a true copy of the list of voters used in the proper polling sub-division and the proper district, which was of record in his office, and which was returned to him by the returning officer for the electoral district and also used by the deputy returning officer at said polling division and in relation to an election for a member to the House of Commons holden on the 15th day of December, 1904, pursuant to the writ, and that the said original list of voters was returned to him by the returning officer, and that the same is in the same plight and condition as it now appears, and that the said original list is now of record in his office. I think all that is required to be shewn to entitle the voter to his status. Now, neither the evidence adduced before me nor the certificate of the Clerk proves any such thing. It is a bald certificate that the document shewn

is of record in his office. It does not shew how it became of record nor what it is a record of. I think it fails entirely to establish what should be established under the decision which I have cited, namely, the Richelieu Election Case, and in dealing with this point here let me quote the very appropriate language of Mr. Justice Strong in the Richelieu case—"In dealing with questions of evidence Courts do not permit facts in themselves susceptible of easy proof to be established by mere inference from other facts from which they are not necessary consequences."

Then again, I think that the want of notice, under sec. 19 of the Canada Evidence Act, is fatal. It is true that the petitioner, after his failure upon the first hearing of the preliminary objections to prove the status, applied for leave to file a certified copy of the voters' list. Upon this motion counsel for the respondent was present and objected to that leave being granted, but the leave was granted. No evidence, however, of any notice having been served upon the respondent was given of his intention to use any such copy as evidence. I do not think it can be argued that the motion for leave to file a certified copy was such notice as the Evidence Act contemplates. The respondent might have been quite content to allow the bare filing of a copy. That would not of itself, I take it, have established the status of the petitioner without further evidence.

As to the other objections I am in greater doubt. The main other objection was that the respondent was not at the time of the presentation and service of the petition herein a person against whom an election petition could be presented under said Act. The returning officer saw fit to make the return day some 53 days after the election. The Controverted Elections Act provides, by sec. 5, that a petition complaining of the undue return, or undue election of a member, or of no return, or of a double return, or of an unlawful act of any candidate not returned by which he is alleged to have become disqualified to sit in the House of Commons at any election, may be presented to the Court by any one or more of the following persons: a person who had a right to vote, a candidate at the election, and so on. Section 9 provides that the petition may be in any prescribed form, but if so, in so far as no form is prescribed, it need not be in any particular form, but it must complain of the undue election or return of a member, or that no return has been made or that

a double return has been made, or of matter contained in any special return made, or of some unlawful act as aforesaid by a candidate not returned. By the Act to amend this Act, ch. 20 of 54 & 55 Vict., it is provided, by sec. 5, that a petition must be presented not later than 30 days after the date fixed for the nomination in case the candidate or candidates have been declared elected on that day, and in other cases 40 days after the holding of the poll, unless it questions the return of election for irregularities afterwards. The difficulty in this case, it will be seen, is that the 40 days limited for the filing of the petition would expire before the return day fixed by the returning officer, that is, it is so argued; the election was not completed but was continuing until the return; therefore, there was no member elected who could be petitioned against until the time for the return had expired, but when that time for the return had expired the time limited by the Act for the filing of the petition would also have expired; so that the electors would be entirely deprived of any right to petition against the undue return or illegal practices. I may say that this petition before me complains of corrupt practices generally covering most of the grounds set out in the Election Act. It is argued that the right to petition is a purely statutory right and must be exercised strictly in accordance with the statute. The petition itself sets out the election, the corrupt practices which it is claimed the respondent was guilty of, and, by the final paragraph, that the respondent was disqualified from being nominated as a candidate and from receiving any votes at the election, the prayer being that it may be declared that the said election is void and for the disqualification of the respondent. Formally and technically the petition does not complain of an undue return or undue election or of no return or of a double return. It does complain of unlawful acts by a candidate not returned by which he is alleged to have become disqualified. It cannot complain of an undue return because there has been no return. Can it then come under the second clause of the section—undue election of a member? It is argued with considerable force that it cannot be said to complain of an undue election because there was no election until the return of the returning officer. Upon this branch of the case there was cited to me the case of Re Rosenfeldt Election, 13 Man. L. R. 87. In that case the returning officer immediately after the election, and without waiting for the result of a recount

of which he had received notice, returned the respondent as elected, and upon that return the Clerk of the Executive Council gazetted the respondent as elected. In the meantime the recount went on, and more than 6 weeks after the filing of the petition the returning officer made a second return. It was argued in that case that, the first return being illegal because the returning officer was obliged to wait for the result of the recount before making his proper return, therefore there was no return, and therefore there was no member against whom a petition would lie. But the Court unanimously held, sustaining the judgment of Killam, C.J., before whom the matter was first heard, that there was a return valid upon its face, and therefore that a petition would lie. Judge Bain, in his judgment, said: "I do not see what else the petitioners could have done if they wished to complain of the election than to file their petition within 30 days after the publication of the Gazette." That case is not of very much help in the present instance, because, it will be observed, there was a return in that case valid upon its face. In the case which I am considering there was nothing but an election without a return. I think it is clear that I cannot consider anything which occurred after the presentation of the petition. The point for me to consider is—what was the status of the parties on the day when the petition was filed? which was anterior to the return; all argument must relate to that date and not to what occurred afterwards. I do not think I can take into account the fact that the respondent was afterwards returned as a member, that he took his seat in Parliament, and acted as a member afterwards. I think I must consider only—what position was he in when he was served with the election petition? As in the Manitoba case I find that very little authority can be had to assist me in coming to a conclusion at all satisfactory upon this case.

I was referred to the West Durham Election Case, 31 S. C. R. 314. There a petition under the Dominion Election Act was served upon the respondent, who had obtained a majority of the votes at the election. It was alleged that he was not properly nominated, and the seat was claimed for his opponent, and it was contended that if it was held that he had been duly elected his seat should be declared forfeited for corrupt acts. The point in that case taken by the respondent was that if he was not duly nominated he was therefore not a candidate and he could not be made a respondent. But the

Court held that he was a candidate de facto, if not de jure, and that the petitioner could not claim the seat without giving him an opportunity to assert his rights. In that case a special return was made of all the circumstances to the Clerk of the Crown in Chancery, and no member was returned. That is the only case I can find at all like the present one.

I was also referred to the case of Yates v. Leitch, L. R. 9 C. P. 605; but I do not think that case is very much in point, as the person there petitioned against prior to the petition assumed the office. Such assumption in this case was never made until after the presentation of the petition, as far as any evidence before me shews, and the respondent remained quiescent until the regular return was made by the returning officer some 13 days after the presentation of the petition. I think this case will have to be considered upon broad grounds. I was at first very much impressed with the argument that, there being no return, there was no member, and that, there being no member to petition against, there could be no petition. But in what position will that place the electors or this petitioner? The petitioner has done all that he possibly can do to bring this matter up for adjudication. He waited until the last minute to file his petition. If he had waited any longer he would clearly have been out of court, because there is no provision by which he could file a petition later than the 40 days. Why the returning officer did as he did I cannot understand; possibly on account of the difficulty in this extent of country where travel is difficult, of getting a return within the 40 days. Whatever his reason was, it cannot matter. We have the unfortunate fact that he did not consider the Controverted Elections Act when fixing the date for his return.

I am disposed to think, first, that the election is the real thing, after all, and not the return. The returning officer might, if so disposed, defeat the very object of the Controverted Elections Act by delaying his return as this returning officer did under this Act. Would it then be impossible to contest a corrupt election? I find in the Cyclopædia of Law and Procedure, vol. 15, p. 397, a note of an American case where it was held that the failure to make a return from one or more precincts, no matter for what cause, will not invalidate the election unless it be shewn that the votes not returned would have changed the result, and further that the failure to return the result of a certain poll within the pre-

scribed time by law does not of itself authorize the rejection of the vote of that poll; and, again, at p. 387 of the same volume—"The right to an office dependent on an election by the people is to be determined ultimately by the number of legal votes received at the election and not by the certificate of the returning officer." If there had been no return, the law provides for a protest, and I take it that the returning officer and the candidate might be the respondents. Everything required to be done in this election was done except the formal return of the returning officer. Every act to constitute the respondent a member of Parliament was completed except the formal return, and that formal return might have been compelled either under the Election Act or by a mandamus. Can it then be said that a candidate unduly elected could retain his seat simply because the protest was filed before that return was forced from the hands of a reluctant returning officer.

Then, again, I am inclined to think that the Act itself provides for just such a protest. One clause of sec. 5 is that "a petition complaining of any unlawful act by a candidate not returned, by which he is alleged to have become disqualified to sit in the House of Commons, may be presented." It may be argued that that clause of the section relates to the filing of a cross-petition by the respondent against the candidate who has petitioned against him, or against the candidate on whose behalf the petition was presented; but I do not think so, because that is afterwards provided for by a separate and distinct section. I therefore think that under that clause this protest is properly presented.

As to the other objections, I do not think I need consider them. I think the petition is in sufficient form and sufficiently complains of an undue election under sec. 9. As I have said before, it does not in form, but in substance and meaning it does, complain of the undue election of the respondent for improper practices; but, as I have already found that the proof of status is not made out by the certified copy of the voters' list produced, nor by the certificate of the Clerk of the Crown in Chancery, and that that evidence should not be received because no notice of the intention to use it was served 10 days before the hearing, as required by the Evidence Act, I hold that that objection must prevail, and therefore that the preliminary objections are sustained and the petition dismissed with costs.

MANITOBA.

DECEMBER 15TH, 1905.

FULL COURT.

ARBUTHNOT v. DUPAS.

Principal and Agent—Husband and Wife—Authority of Husband as Agent for Wife—Sale of Goods to Husband on his Credit — Erection of House on Wife's Land — Action against Wife for Price of Goods — Payment by Wife to Husband while Husband Still Regarded as Principal.

County Court appeal.

A. E. Hoskin, for defendant F. Dupas, appellant.

A. J. Andrews and R. M. Noble, for plaintiff.

The judgment of the Court (DUBUC, C.J., MATHERS, J.), was delivered by

MATHERS, J.:—This is an appeal by defendant Filanise Dupas from the decision in favour of plaintiff of the Senior County Court Judge at Winnipeg.

At the conclusion of plaintiff's case a nonsuit was moved for, which was refused. The appellant then gave evidence on her own behalf, and this appeal is not from the refusal of the County Court Judge to grant a nonsuit, but from the verdict entered on the whole case.

The action was to recover the price of lumber used in the erection of a house on the appellant's land. The lumber had been bought by the appellant's husband in his own name, and he alone was charged in the plaintiff's books. At the time of the sale plaintiff believed that the husband was buying the lumber for himself as principal. Upon discovering facts which he believed pointed to the appellant as the principal and her husband only as agent, plaintiff brought this action, as he had a right to do, against the appellant.

The only evidence from which the agency of the husband can be inferred is that of the wife. She deposed that she did not become aware of plaintiff's claim until about a year

after the lumber was purchased; and the examination then continued as follows:—

Q. Were you surprised at that claim?

A. Yes, I was indeed.

Q. Why?

A. Because the lumber was paid on my part.

Q. It was paid on your part before the writ was served on you?

A. Yes.

Q. You are the person who built the house?

A. No, he built the house against my will.

Q. Why didn't you want the house built?

A. Because I didn't want to make any debts.

Q. You wanted to pay cash?

A. Yes.

And further on the examination continues:

Q. After the house was up and before this action you claim that you paid the thing. Did you?

A. Yes.

Q. How did you pay it?

A. I borrowed money on the property.

Q. What did you do with it?

A. I gave it to my husband to pay this.

Q. How much did you give him?

A. I gave him $250.

The learned County Court Judge must have inferred from the evidence that the appellant's husband had her authority to buy the lumber in question for her and that while contracting in his own name he was really contracting as her agent.

I cannot say that he erred in drawing that inference. To my mind any other conclusion would be inconsistent with the evidence of the appellant above quoted.

It is said, however, that she had paid her agent, while he was still, in so far as plaintiff knew, the principal debtor, and, therefore, she is discharged from liability.

The dicta of the Judges in the cases of Thomson v. Davenport, 9 B. & S. 78, and Stokes v. Armstrong, L. R. 7 Q. B. 598, relied upon by the appellant, are wide enough to support that contention.

The later case of Irvine v. Watson, 5 Q. B. D. 102, has however much narrowed the rule there laid down, and the

Court, although not expressly overruling Stokes v. Armstrong, reserved the right to reconsider it, should the question again arise.

In Irvine v. Watson, Bramwell, L.J., refused to adopt the law as laid down in Thomson v. Davenport and Stokes v. Armstrong, and accepted as the more correct Baron Parke's statement of it in the earlier case of Heald v. Kenworthy, 10 Ex. 739. There Baron Parke had stated the rule to be confined to cases where the conduct of the seller had made it unjust for him to call upon the buyer for payment.

The result of the cases is, I think, well stated in the last edition of Pollock on Contracts, at p. 104, as follows:—"The principal is discharged as against the other party by payment to his own agent, only if that party has by his conduct led the principal to believe that he has settled with the agent; or, perhaps, if the principal has in good faith paid the agent at a time when the other party still gave credit to the agent alone and would naturally from some peculiar character of the business, or otherwise, be supposed by the principal to do so."

The same principle is laid down in Broom's Common Law, p. 585, in somewhat different terms, as follows:—"The net result appears to be that unless the seller either by his own laches, in not demanding payment with due promptness, or by so conducting himself as to lead the buyer to believe that he has been paid by the agent, has estopped himself from proceeding against the principal, the latter, whether unnamed or undisclosed, will not be discharged by payment to an agent unless such payment, as a matter of fact, reaches the seller."

In Addison on Contracts, 1903 ed., at p. 149, the law is similarly stated.

It is not suggested that there was anything in the plaintiff's conduct which should lead the appellant to believe that he had settled with her husband, or that there was anything in the character of the business that would naturally lead the appellant to suppose that the plaintiff would give credit alone to her husband.

The appeal should, therefore, be dismissed with costs.

MANITOBA.

DUBUC, C.J. DECEMBER 19TH, 1905.

TRIAL.

BERNST v. KUHN.

Vendor and Purchaser—Sale of Land—Action to Rescind—Undue Influence — Mental Incompetency — Vendor's Understanding of Transaction—Inadequacy of Consideration—Conflicting Evidence.

Action for a declaration that certain documents signed by plaintiff in January, 1905, were void and should be set aside, on the ground that his signature to the same was obtained by the undue influence of defendant Kuhn while he was in a state of physical and mental disability caused by an attack of typhoid fever.

The documents were an application to bring two lots of land which he owned, in Winnipeg, under the real Property Act, together with directions to the District Registrar to issue the certificates of title to the defendants Menzel and Lohr respectively, and two transfers of his rights in the lands to the said two defendants.

The action was first brought against the defendants Kuhn and Menzel, but, at the beginning of the trial, plaintiff's counsel applied for and obtained leave to add G. Lohr as a defendant.

The defendant Kuhn denied that any undue influence was exerted over plaintiff to induce him to sign the documents in question, and alleged that plaintiff was at the time in all respects mentally capable of transacting business, and that he fully understood the nature and effect of the documents he was signing.

The defendants Menzel and Lohr alleged that they were purchasers for valuable consideration, without notice, of the respective parcels of land conveyed to them.

E. L. Howell and A. B. Hudson, for plaintiff.

H. W. H. Knott, for defendants.

DUBUC, C.J.:—In order to succeed, the plaintiff has to shew; (1) that his mind was so much impaired by his illness

and so weak that he was not able to understand the full purport of the transaction; (2) that he sold the property at such an undervalue as to constitute inadequacy of consideration.

On both points the evidence is very conflicting. The plaintiff himself swears that he became ill with typhoid fever about the middle of December, 1904, and that, for a period of 6 weeks, from 17th December until the end of January, there is a complete blank in his memory, and that he does not remember anything that happened during that period. Whether this is untrue, or whether it is a case of that phenomenon by which a person is supposed to have lost track or memory of everything that has occurred during a certain space of time, while remaining conscious and acting rationally during the same period, I will not undertake to decide. I am inclined to think, however, that this statement of the plaintiff savours of exaggeration. Whatever it may be, the evidence clearly establishes the fact that, in many instances during that same period, he spoke and acted sensibly as would do a man of his intelligence who has his full understanding.

He went to see Dr. Clark on 21st and 31st December. Dr. Clark says that he found the plaintiff had a mild attack of typhoid fever; that sometimes delirium occurs in such illness; but that plaintiff was not delirious and that he gave rational answers to his questions. Dr. McCalman was called to attend him on 21st, 22nd, and 28th January. He says that plaintiff was very ill and weak and not in a position to transact business. In cross-examination he stated that he did not appear non compos mentis, and he had his thinking capacity. Several witnesses examined on behalf of plaintiff stated that, in the month of January, and particularly about the 19th, when the documents were signed, the plaintiff was out of his mind and talked nonsense like a child, and that, in their opinion, he was not in a state of mind to transact business. Other witnesses brought on behalf of the defence testified that during the same period plaintiff was ill and physically weak, but that his intelligence appeared to be as good as when he was in good health; that he talked and acted sensibly; and that he seemed, in all respects, in a position to transact business.

There is the fact that, when the documents were brought to him to be executed, he signed some of them and then took a rest of half an hour before he appended his signature to

MANITOBA.

DUBUC, C.J. DECEMBER 19TH, 1905.

TRIAL.

BERNST v. KUHN.

Vendor and Purchaser—Sale of Land—Action to Rescind—Undue Influence — Mental Incompetency — Vendor's Understanding of Transaction—Inadequacy of Consideration—Conflicting Evidence.

Action for a declaration that certain documents signed by plaintiff in January, 1905, were void and should be set aside, on the ground that his signature to the same was obtained by the undue influence of defendant Kuhn while he was in a state of physical and mental disability caused by an attack of typhoid fever.

The documents were an application to bring two lots of land which he owned, in Winnipeg, under the real Property Act, together with directions to the District Registrar to issue the certificates of title to the defendants Menzel and Lohr respectively, and two transfers of his rights in the lands to the said two defendants.

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E. L. Howell and A. B. Hudson, for

H. W. H. Knott, for defendant

DUBUC, C.J.:—In order t
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He went to see Dr. [illegible] Dr. Clark says [illegible] of typhoid [illegible] ness; but that [illegible] rational answers to [illegible] to attend him on [illegible] that plaintiff was [illegible] wear and [illegible] transact business. In cross-examination he [illegible] did not appear [illegible] compos mentis, and [illegible] capacity. Several witnesses examined on [illegible] stated that, in the month of January, and [illegible] the 19th, when the documents were signed [illegible] out of his mind and talked [illegible] in their opinion, he w[illegible] business. Other wit[illegible] test[illegible] during [illegible]

the others. But there is also the fact that on the same occasion, when Magnussen, the law student who had prepared the papers, explained to him the purport of the direction by which he was asking the District Registrar to issue the certificates of title for lots 206 and 207 to Menzel and Lohr respectively, he, the plaintiff, of his own motion, asked that a similar direction might be drawn by which the certificate of title for lot, or portion of lot, 232, be issued to his son. And that was done. This certainly shews that his mind was clear enough then to understand and comprehend what was being done.

The transaction sought to be impeached was brought about as follows. The plaintiff was the owner of the lots above mentioned. On one of them he had an old house which was rented, on the other there was a new house in course of construction. He owed certain sums of money and particularly a lumber bill to Arbuthnot, amounting to $687; and it appeared that Arbuthnot was pressing him for payment. He was afraid that failing to pay this bill, he might lose the new house. This weighed on his mind and he talked with his wife of selling the house to settle the account. The plaintiff's son went to see Kuhn for assistance. Kuhn came to see plaintiff about 2nd or 3rd January, and plaintiff asked him to find a purchaser for his lots and houses, as he wanted money to pay the lumber bill. Kuhn suggested a loan from some loan company. The plaintiff said that that would be of no use, as he had already, on the lots, a mortgage of $1,000 in favour of one Mighill, from whom he had purchased the property. The plaintiff suggested to Kuhn that if he could not find a purchaser he might buy the property himself. Some days after the plaintiff's wife went to see Kuhn, and asked him if he had found a purchaser, or if he would buy himself. Kuhn went again to see the plaintiff, who asked him to purchase the property. He wanted $4,000 for it. Kuhn offered $3,500, which sum plaintiff finally accepted. The terms were discussed and agreed upon. The plaintiff's wife and a man named Kantz were present at that interview. Kuhn says that on that day, or within a couple of days, he paid plaintiff $100 as a deposit, and that plaintiff said, "All right, the property is now yours," or words to that effect.

Kuhn then sold the new house to Menzel for $2,150, and the old one to Lohr for $1,800. He states that he told plaintiff that he had sold the houses to these two men, and

plaintiff declared himself satisfied with the transaction. He states also that plaintiff told him to have the papers prepared. This was about 16th January. Kuhn had the papers prepared by Magnussen. The documents were those above mentioned, and, in addition, two mortgages, one from Menzel and one from Lohr, both in favour of plaintiff. Kuhn went to plaintiff's house on 19th January with Lohr and Magnussen. Both Kuhn and Magnussen swear that Magnussen explained the nature and purport of the papers to plaintiff; the explanation was given in German, the mother tongue of plaintiff; and they both say that he understood the full meaning of the transaction.

The papers were then signed by plaintiff as above stated. His wife and his son-in-law were present. Shortridge, Arbuthnot's agent, was there at the time, and Kuhn, after getting $250 from the plaintiff's wife to apply on the lumber bill, gave his cheque to Shortridge for $687, to settle the lumber bill. Plaintiff was seen outside in his yard, about the end of January. Lohr took possession of the house so bought by him on 1st February. Plaintiff knew that the house had been sold and possession given to Lohr, and spoke of the bargain with Lohr. Shortly afterwards plaintiff and his wife visited the Lohrs in the house; the sale was mentioned, and plaintiff seemed to be well satisfied with the transaction. It was only later, about the end of February, or beginning of March, that plaintiff complained that he had been cheated on the price of the property; and he filed his statement of claim.

As to inadequacy of consideration, I find, on taking into consideration all the evidence given as to the actual value of the property at the time, that it was worth about $3,950, the price which Kuhn sold it for, or say $4,000. The price of the sale by plaintiff to Kuhn, $3,500, is just seven-eighths of that amount. Having in view the circumstances shewing how real property has advanced in value in this country, particularly within the last two years, I cannot see that, in a transaction like this, a difference of one-eighth in the actual value can be held to constitute an inadequacy of consideration. Some men have more facilities, or better luck, than others, to make a good bargain. Many transactions are carried out by men of perfectly sound mind who, almost immediately after binding themselves, find out that they might have obtained for their property a much larger price

than the one for which they have actually sold. This has been shewn by many a case brought before the Court.

On the whole of the evidence, I find that plaintiff was ill and physically weak during the month of January; that his mind might, in consequence, have been more or less affected at certain moments of his illness; but, considering all the facts of the case brought out in evidence and the circumstances under which he found himself at the time, being pressed to pay that lumber bill, I am not satisfied that, had he been in perfect health and his mind as sound as ever, he would not have sold the property for the price which he actually obtained for it.

To defendant Kuhn and to Magnussen, who, on 19th January, went to the plaintiff's house and had the papers signed by him, plaintiff no doubt appeared sick and weak; but it does not seem that they had reason to think that he was out of his mind, and he did not fully understand the nature and purport of the transaction, or of the documents that he was signing.

In my opinion, plaintiff has not made out such a case as to entitle him to the relief asked for, and the action should be dismissed with costs.

NORTH-WEST TERRITORIES.

(SASKATCHEWAN.)

PRENDERGAST, J. NOVEMBER 17TH, 1905.

TRIAL.

MEYERS v. DEBOLT.

Partnership—Evidence of Existence—Moneys Contributed by Partners—Assets—Account—Dissolution.

Action to establish a partnership and for an account and dissolution.

H. Acheson, Saskatoon, for plaintiff.

T. D. Smith, Saskatoon, and Brown, Saskatoon, for defendant.

PRENDERGAST, J.:—This is a partnership action, and the evidence is most contradictory—so much so, indeed, that

I cannot conceive for one moment how both parties could conscientiously believe that what they said under oath at the trial was the truth.

On the broad question as to whether there was a partnership, I believe with plaintiff that there was one. I so believe on the weight of evidence from disinterested witnesses, and from the admitted conduct of the parties; from the fact that they put one class of buildings on plaintiff's land, and another class on defendant's: from the way they worked the horses and implements, put in the crop, stored the grain; from the manner in which they gave and took mortgages, and used the money; from the absence of accounts between them, and from admissions shewn to my satisfaction to have been made by defendant.

Plaintiff alleged that he contributed to the partnership two sums of money: $1,150 and $1,200, which he said he spent in small amounts for freight, travelling expenses, horses, implements, buildings, food, seed grain, labour, etc.

The sum of $1,150, he says, was composed of $800 proceeds of a loan on his farm in the States, and $350 paid to him as rent and for labour. Then he puts in exhibit "K," purporting to shew how this sum was expended. I think, however, that I should strike off this statement $200 described as "unenumerated," and certain other items (such as lumber for well $12, drill $85, and a couple of others), not shewn conclusively to have been previous to 4th May, 1903, when the second sum of $1,200 was received by Meyers. It is only by thus keeping the two sums apart that I can determine with any degree of reasonable certainty what amounts were really put into the concern. I should also strike out $56 (20 and 36), as manifestly in excess of what was spent for provisions on the trip to Canada and for horses' feed for one month. The items so disallowed amount to $500, which leaves $650, instead of $1,150, as the first sum contributed by the plaintiff.

As to the second sum of $1,200, the books of the Bank of Hamilton at Saskatoon shew that that amount, less exchange, was deposited to Meyers's credit on 4th May. Plaintiff has shewn conclusively that most of the debits of this account represent cheques he issued for the use of the firm,—and

also that Debolt, whether entitled to the same or not, has had possession of the other cheques, which could not be produced. This account, however, shews an unexpended balance of $221, which I also disallow, and together with two cheques which seem included in exhibit "K" ($100), thus bringing down Meyers's second money contribution to the partnership from $1,200 to $879.

Plaintiff then advanced to the firm ($650 and $879), the total sum of $1,529—say $1,500.

Defendant, on his part, swears that he brought to Canada $840, and that he spent it all for the use of the firm. This is surely not shewn to my satisfaction. I will, however, accept that figure, as the learned counsel for plaintiff, in his written argument, assumes or takes it for granted that the difference between plaintiff's and defendant's contribution is about $700, and all his calculations are on that basis.

This will then leave in favour of plaintiff $660, as to excess of his contribution to the firm ($1,500) over that of defendant ($840).

Now, the buildings belong to the respective homesteads on which they are erected, and cannot be removed. I find that those on defendant's land are worth $450 more than those on plaintiff's, and the latter should be credited with that amount.

Defendant also admits that he has disposed of 720 bushels of wheat (being all the wheat grown, less 150 bushels, which I understand is still in the elevator), and of 165 bushels of flax. Plaintiff is entitled to his half of this also, which half, putting the wheat and flax at 70c., amounts to $310.

I do not allow plaintiff's claim for a payment alleged to have been made by Knapp to defendant on a note, as such payment was made in work, for which defendant is otherwise charged, nor for the difference in the acreage broken on both homesteads, as the work would be done with the partnership outfit, and plaintiff would have to supply a man to help under the agreement,—which would reduce the item to an insignificant amount.

I understand that all claims with respect to the waggons, implements, and household furniture are abandoned, and assume that they are to be considered as the property of the owners of the land on which they now happen to be.

The three amounts allowed plaintiff as above ($660, $450, and $310), then form a total of $1,420.

This is assuming that the 150 bushels of wheat are still in the elevator, and that the 7 horses, of which 2 were with plaintiff and 5 with defendant at the institution of the action, are still virtually subject to the control of the Court under the injunction.

It is declared that a partnership existed between the parties from March, 1905, and it is decreed that the same be, and the same is, hereby dissolved.

The 7 horses of which 2 were in plaintiff's and 5 in defendant's possession at the time of the trial, are hereby declared to be partnership property, together with all oats which may be on either homestead, together with the promissory note made by Knapp in favour of the parties, and now in defendant's possession.

There will be an order for the delivery by defendant to the clerk of the Court of the promissory note in question.

There will be an order for the sale of the partnership property, for the payment to plaintiff out of the proceeds of the same of $1,420, and for a division between the parties of the balance of such proceeds, if any.

There will be an order that after the sale, judgment be entered for plaintiff against defendant for such portion of the sum of $1,420 as may remain unsatisfied after the said proceeds are paid over to plaintiff as aforesaid.

The injunction order already issued restraining the parties from taking or disposing of the partnership assets or any part thereof, is hereby continued.

There will be leave to either party, upon shewing that the 150 bushels of wheat aforesaid or any part thereof, or any of the horses hereby declared to be partnership property, or the said promissory note, has or have been appropriated or disposed of by the other party, to apply to have the declaration and orders above provided for, amended and altered accordingly.

The costs of this action will be paid out of the partnership assets, after sale of the same as above provided.

NORTH-WEST TERRITORIES.

(SASKATCHEWAN.)

PRENDERGAST, J. NOVEMBER 18TH, 1905.

TRIAL.

LAND v. GESCHE.

Principal and Agent—Agent's Commission on Sale of Land—Amount of—Evidence—Dealings with Father and Son.

Action to recover a balance of a sum alleged to be due for commission upon a sale of land effected by plaintiff for defendant.

J. D. Ferguson, Saskatoon, for plaintiff.

H. Acheson, Saskatoon, for defendant.

PRENDERGAST, J.:—In this action plaintiff, Land sen., claims $60 as balance of commission on a sale of land, he having already received $100.

Plaintiff says that he was to receive 5 per cent. commission, and that defendant wanted $3,200, but only got $2,900, so that all he could be entitled to under any circumstances would be $45 and not $60.

Defendant's contention is to the effect that the person to whom he gave the land to sell, is Land jun. The Lands, father and son, are farmers, living on a quarter section adjoining the one in question. Land jun. admits this at least: "The defendant first listed the land with me;" and he gives the terms of that listing as follows: "If I could sell the place at $20 he'd give me 5 per cent." He also says he thinks it was himself who introduced the purchaser to defendant—although adding as an explanation that his father was detained at home by a sick friend that day, and the purchaser, although adverse to defendant, states that a letter he got when in Iowa concerning the quarter section, was written by Land jun.

There was produced for the defence a paper-writing signed by Land jun., purporting to be an assignment of his commission "consisting of $100" in favour of his father, to whom he authorized the purchaser to pay the same.

Defendant says in this respect that on the same day that Land jun. brought the purchaser to him, and they settled the terms of the sale, he (defendant) represented to him (Land jun.) that he had expected $20, but that, having had less, he would cut down the commission, making it $100, to which Land jun. agreed. He says that Land jun. then asked him to pay that amount to his father, he being indebted to him, and that, as he (defendant) did not feel safe in doing so on a verbal request, he wrote out the assignment above mentioned and had Land jun. sign the same.

In corroboration of the above, defendant's brother states that on the day of the sale, Land jun. having told him that he had found a purchaser for his brother, he asked him if he would not give him that $100, as he was indebted to him for a team of oxen, and Land jun. replied: "No, I can't, I have assigned that to my father."

Plaintiff of course says that the land was listed with him, and that it was through him that the sale was made,—also that the assignment was obtained from his son by fraud, and that he threatened defendant with suit when he said that the order he was getting on the purchaser was only for $100.

Defendant surely dealt with Land jun., on his own admission, and if he dealt also with Land sen., the part played by father and son in the matter was such that they should be considered as one.

Land jun. says that the land was first listed with him, that he wrote to the purchaser in Iowa concerning it, that he introduced the latter to defendant, and his statement of the agreement with him is that he was to receive 5 per cent. if he could sell for $3,200, and they sold for $2,900.

On this basis, and all things considered, I think that $100 was just about a fair compensation, which makes it also more likely that it was accepted by the father in full settlement as contended by defendant.

Judgment is for defendant with costs.

NORTH-WEST TERRITORIES.

(SASKATCHEWAN.)

PRENDERGAST, J. NOVEMBER 24TH, 1905.

TRIAL.

TIEL v. TAYLOR.

Vendor and Purchaser—Agreement for Sale of Land—Specific Performance—Offer — Acceptance — Conditions—Incomplete Agreement.

Action by purchaser for specific performance of an agreement for the sale of land, and in the alternative for damages.

T. D. Smith, Saskatoon, and Brown, Saskatoon, for plaintiff.

H. Acheson, Saskatoon, for defendant.

PRENDERGAST, J.:—Defendant had an agreement with the Canadian Pacific Railway Company for the purchase from them of a certain quarter-section of land, and had made certain payments thereon. Plaintiff was aware of this, but not, however, of the fact that defendant was a trustee for Dr. Willoughby for one-half of the interest secured under the said agreement; in other words, defendant and Dr. Willoughby were virtually owners in common of the land. The parties dealt with each other throughout as if defendant were the sole owner, at least to the extent of the agreement with the company, and the questions raised herein must be dealt with as if such were the case.

Plaintiff, who is a real estate agent at Saskatoon, had several times approached defendant with respect to the sale of this land. Defendant wanted $6 net, which, as plaintiff thought then, left no room for commission.

Defendant having, however, left for Ireland in March, 1904, plaintiff wrote to him on 3rd June following, telling him that he had been vainly trying to sell the quarter-section, but had decided to buy it himself at $6, adding:—"If this is satisfactory to you, please to let me know, and I will

make a deposit in either bank you wish, and we can have the papers made out at leisure." To this defendant, on 21st June, replied by the following letter, which plaintiff received 8th July: "I received your letter and offer of $6 for N. E. 9.38.8., which I will take. Of course that price is net. If you go to Mr. Acheson, he will make out the transfer, and will send it to me to sign. If you deposit $100 with him, that will do until the transfer comes back from me signed, when you can pay the remainder."

The first question is, whether the first letter contains an offer and the second an acceptance, so that the two constitute a complete agreement.

The same land was intended by both, and so for the price, which was to be $6 net, for, although plaintiff does not use the word, yet he knew that defendant would not accept less, and, moreover, buying for himself as he says, he could of course deduct nothing for commission. As to the deposit, both parties evidently used the word in the sense of earnest money, and not of the full purchase price, and their mind was one to that extent. But it seems to me that after plaintiff used the very general words "I will make a deposit," defendant by saying "if you deposit $100," was providing for something, or setting down a condition, which plaintiff had given him no intimation whatsoever that he would accept. If plaintiff had replied to defendant's letter: "I find that the sum of $100 which you ask as a deposit is excessive, and am only prepared to pay down $25," what could defendant then have done, except either abandon the negotiations or accept this new term, which would mean of course a new agreement?

In the case of Marsh v. Jones, 40 Ch. D. 563, the defendant agreed with the plaintiff, his tenant of a mill, to purchase at a fair valuation, at the expiration of the tenancy, some machinery which the plaintiff was setting up in the mill. The defendant refused to purchase the machinery, and the plaintiff instituted proceedings, which were dismissed. The Court of Appeal reversed the decision, and gave judgment directing a reference to an official referee to ascertain the valuation, and ordering the defendant to pay it when ascertained. But this of course was quite a different case. The parties had agreed on a fair valuation, and besides, a fair valuation represents a determined and ascertainable quantum, which a deposit does not.

I find that the so-called letter of acceptance of defendant contains a new term or condition, and is therefore not an acceptance at all or only a conditional one, and as such required something further to be done before the agreement was complete. In fact, plaintiff seems to have considered it so himself, as we shall see hereafter by the cable which he sends to defendant.

Up to this stage, then, nothing definite was done. It was however then in plaintiff's power to complete the agreement and make it binding, either by signifying to defendant his acceptance of the new term as to the deposit, or by actually making the deposit of $100 with Mr. Acheson, as provided in defendant's letter. But of course as long as the agreement was not completed defendant had power to revoke.

Now, what happened next? On 9th July, i.e., the day following the receipt of defendant's letter of 21st June, plaintiff went to the office of Mr. Acheson, defendant's solicitor, and spoke to him of the letter he had received from defendant. Mr. Acheson had in fact also received one from defendant apprizing him of the facts. As they were talking the matter over, Dr. Willoughby walked in, and informed them, as the fact was, that he had authority from defendant before he left for Ireland to sell the quarter-section in question, and that he had done so 4 or 5 days before.

Plaintiff, however, insisted on leaving $100 with Mr. Acheson, for which the latter gave a receipt in a form which he knew, as he says, did not commit his client, and plaintiff at once cabled to defendant as follows: "Offer accepted, paid Acheson $100."

If Willoughby had not intervened, and plaintiff had paid or even tendered the deposit to Mr. Acheson, I am of the opinion that the agreement would have been complete.

As it was, and even though Dr. Willoughby's presence seems to have been accidental, I think that his declaration to plaintiff as defendant's agent, that he had sold the land, as the fact really was, amounted to a revocation.

I do not see that Shaw v. Foster, L. R. 5 H. L. 231, and Coles v. Trecothick, 9 Ves. 234, have any bearing on the present case—except that in the latter the Lord Chancellor said: "It is clearly settled now that an agent (to sell) need not be authorized in writing—" which would go to shew Dr. Willoughby's authority as to defendant's interest in the matter.

As to Magann v. Auger, 31 S. C. R. 186, it simply reaffirms, as applying also in the province of Quebec, the well known rule that an offer cannot be revoked after a letter of acceptance has been mailed, although not yet received, and is not in point here.

In McIlvride v. Mills, 1 W. L. R. 229, the two points were whether there was a memorandum in writing sufficient to satisfy the Statute of Frauds, and a question of fraudulent representation, which are not raised here.

Bain v. Fothergill, L. R. 7 H. L. 158, deals with the liability of a vendor upon a contract for the sale of real estate where he is unable to make a good title, and reviews at great length the leading case of Flureau v. Thornhill, 2 W. Bl. 1078. But this case first supposes a complete agreement, which I do not find to exist here.

Judgment is for defendant with costs.

YUKON TERRITORY.

OCTOBER 2ND, 1905.

FULL COURT.

RAYMOND v. FAULKNER.

Money in Court—Payment out—Costs — Solicitors — Lien —Judgments—Priorities—Stop Orders—Contract—Construction.

An application was made on behalf of defendants to MACAULAY, J., for an order for payment or delivery out of the balance of the gold dust in Court to the credit of this action, to be distributed as follows: first, to Messrs. Clark, Wilson, & Stacpoole, of whatever amount they were entitled to as solicitors for the defendants in this action; second, the balance of the gold dust to Messrs. Pattullo & Ridley, attorneys and agents for the defendant Andrew J. Kroenert; and for payment by the Canadian Bank of Commerce to A. J. Kroenert of the costs of and incidental to the application; the bank having refused to vacate a stop order obtained against payment out of the moneys in the month of June, 1901.

MACAULAY, J.:—It appears by the evidence that the Bank of Commerce on or about 29th June, 1901, obtained a judgment against defendant G. M. Faulkner for $4,687.72, and on the same day obtained a stop order against certain moneys or securities, viz., a quantity of gold dust that had been paid into Court by the defendants in two actions of Williams v. Faulkner et al. and Raymond v. Faulkner et al., being paid out of Court without notice to the said bank.

In the month of July, 1901, the defendant Kroenert obtained a judgment against the defendant Faulkner for $6,315.10, and on the 25th of the same month obtained a stop order prohibiting the payment of the above mentioned moneys out of Court without notice being first given to defendant Kroenert.

Afterwards an agreement was entered into on 13th November, 1902, between defendant Faulkner, defendant Kroenert, the Canadian Bank of Commerce, and Messrs. Clark, Wilson, & Stacpoole, by which it was agreed that the gold dust in Court to the credit of Williams v. Faulkner should be distributed in a certain manner between the said parties: and that gold dust was accordingly distributed.

It was further agreed, among other things, that the gold dust which remained in Court to the credit of the action of Raymond v. Faulkner, in case the defendants should succeed in the action, and that a portion of the gold dust, or the whole of it, should remain to their credit, should be distributed as follows: (a) to Clark, Wilson, & Stacpoole 7 per cent. of the amount of gold dust to which the defendants may be declared to be entitled; (b) to the defendants Faulkner and Kroenert whatever amounts might be advanced or paid by them or either of them in connection with litigation after the said date, but in no case was the amount to exceed $200; (c) to A. J. Kroenert three-quarters of the balance of such gold dust; (d) the remaining one-quarter of such balance to the Canadian Bank of Commerce to an amount sufficient to satisfy their judgment against Faulkner.

It was also provided that if the defendants were only partly successful in the said action of Raymond v. Faulkner and should be compelled to pay to the plaintiffs therein any sums for damages or costs, that such damages and costs should be paid out of the said gold dust to the credit of the said action before there should be any distribution thereof under the said agreement.

It was further agreed that in case the defendants should appeal from the judgment at the trial of the said action that was then pending, and the defendants should be awarded a greater amount of such gold dust than they were awarded by the judgment at the trial, that the bank should, by agreeing to 25 per cent. of the expenses in connection with such appeal being chargeable against their share, as provided in this agreement, of the gold dust awarded by the said judgment at the trial, be entitled to share in any additional amount of gold dust awarded the defendants on such appeal to the extent and on the basis provided for by the said agreement, viz., 25 per cent. of said additional sum awarded, but otherwise should be entitled only to the 25 per cent. of the gold dust awarded by the judgment at the trial as aforesaid; it being fully understood, however, that in case the bank should agree to their said share of the gold dust being chargeable with 25 per cent. of the expenses of such appeal, that the bank should not be considered in any way a party to the appeal, and in no case be liable for any costs incurred, or to be incurred, in the action of Raymond v. Faulkner; and it was further provided that in no case should the share of the bank in the gold dust awarded by the judgment at the trial be subject to the costs of any appeal except it joined in such appeal; but that said share should be payable first out of any moneys or gold dust in Court to the credit of the said action.

It was further provided that nothing in the agreement should affect the rights of Clark, Wilson, & Stacpoole, as solicitors, to a solicitor's lien in respect to the balance of their retainers in the said actions above set forth or in respect of their 7 per cent. commission in the said action of Raymond v. Faulkner; the said Clark, Wilson, & Stacpoole abandoning any claim to costs recovered by the defendants from the opposite parties in the case of Williams v. Faulkner, or which might be recovered by the defendants from the opposite parties in the case of Raymond v. Faulkner.

It was further provided that the signing of the said agreement, or the receipt by the said bank of any gold dust or moneys under and by virtue of the same, should not be nor be deemed to be, or to operate as, a waiver or merger of any rights or remedies that the said bank might have under their said judgment against the said Faulkner.

It further appears in evidence that the result of the trial of the action of Raymond v. Faulkner was such that, according to the judgment of the trial Judge, the gold dust in Court to the credit of the cause was not more than sufficient to satisfy the judgment in favour of plaintiffs, and nothing remained for distribution between the parties to the said agreement. There was an appeal taken, however, from the judgment of the trial Judge, and the damages awarded by him were reduced to such an amount that there remained a balance in Court to the credit of the cause.

Mr. Pattullo, who supported the motion on behalf of the defendants, after reciting the above facts, argued that the Bank of Commerce had not taken any part in the appeal, and were consequently, under the terms of the agreement of 13th November, 1902, not entitled to share in the distribution of the proceeds of the gold dust which remained in Court to the credit of this action, and further contended that Messrs. Clark, Wilson, & Stacpoole, having entered into a new agreement with the defendants dated 26th December, 1902, by which they agreed to accept the sum of $200 in full for their services in connection with the appeal, were not entitled to the 7 per cent. as provided in the said agreement of 13th November.

Unfortunately there appears to be a misunderstanding between the solicitors as to what action the Bank of Commerce took in regard to the appeal in the cause of Raymond v. Faulkner. On 30th March, 1903, Messrs. Pattullo & Ridley wrote a letter to Messrs. Clark, Wilson, & Stacpoole, stating, among other things, that they had not yet received a letter from the Bank of Commerce agreeing to pay 25 per cent. of the expenses of the appeal, and asking that the letter be sent to them immediately, as the appeal was ready to be set down.

Mr. Pattullo further swears that he never received any reply to that letter, nor any undertaking from the Bank of Commerce signifying their intention to assist in the appeal.

Mr. Cameron, the manager of the bank, makes an affidavit in the matter in which he produces a letter dated 3rd April, 1903, to Messrs. Pattullo & Ridley, in answer to their communication of 30th March, and swears that he forwarded this letter to Messrs. Clark, Wilson, & Stacpoole for delivery to Messrs. Pattullo & Ridley on the day of the date of the letter. The letter was afterwards found, it is admitted

by Mr. Clark, in some papers in connection with this suit, in his office. Mr. Clark and Mr. Stacpoole both make affidavits in which they swear that they were under the impression that the Bank of Commerce were entitled to a one-quarter interest in the result of the appeal, and were of the opinion that Messrs. Pattullo & Ridley were aware of that fact.

Mr. Clark further states that he received a fee of $250 from the bank for appearing on the appeal, and states that he communicated this fact to Mr. Pattullo, and that Mr. Pattullo was satisfied that he should receive such fee, and he therefore argued the case on appeal accordingly.

Mr. Pattullo, on the other hand, has no such recollection, and it is most unfortunate that there should be such a misunderstanding as there is in this case, between solicitors.

Mr. Clark, in his argument, contended that the evidence shewed that the bank had taken part in the appeal, but that, even if they had not done so, according to the provisions of clause 7 of the agreement of 13th November, all the rights and remedies of the bank were preserved to them, and they were entitled to fall back on their original position which they held prior to any agreement having been entered into between any of the said parties, and contended that, as they had obtained the first judgment against the defendant Faulkner, and also had obtained the first stop order against the funds, they were preferred in law to the defendant Kroenert, who, it was argued by him, had admitted that his judgment against Faulkner was a personal one and not a judgment for partnership moneys, as contended by Kroenert, and cited many authorities in support of his position that his client, under such circumstances, was entitled to the moneys in Court in preference to the defendant Kroenert.

Without discussing the merits of the case as between the bank and Kroenert, as to the moneys in Court, in case no agreement had been entered into between them, I am of the opinion that whatever rights to priority the bank were entitled to as against Kroenert were waived when they entered into the agreement of 13th November. They acted on that agreement, and accepted a portion of the moneys as provided in the agreement, and, although clause 7 of the agreement, which provides that nothing in the agreement shall be deemed to operate as a waiver or merger of any rights or remedies that the bank might have under their judgment against the said Faulkner, is open to the construction placed

upon it by Mr. Clark, it seems to me that it would be inconsistent with the terms of the agreement itself for me to place such a construction upon it, and that the only construction I can place upon it is that the bank provided that by entering into that agreement it should not be considered as a waiver or merger of any rights or remedies that the bank had under their judgment against Faulkner, provided they did not receive a sufficient amount of money out of Court to satisfy that judgment in full, and they still reserved to themselves their rights as against Faulkner for any balance that might be due under the said judgment. This is the only construction I can place upon the clause which would be at all consistent with the other provisions of the agreement.

Having come to that conclusion, it is only necessary for me to decide whether, in my opinion, the bank did avail itself of its rights under the agreement, and assist in the appeal as provided in the agreement, in order to entitle itself to 25 per cent. of the proceeds of the gold dust in Court.

I think I must conclude that Mr. Cameron's letter did not reach Mr. Pattullo, and must have been mislaid in some way. Undoubtedly it was the impression of Mr. Cameron and his solicitors that the knowledge contained in that letter had been conveyed to the opposite party, and they acted in the belief that they were interested in the result of the appeal. On the other hand it is quite clear to me that such knowledge did not reach the solicitors for the defendant Kroenert, and not having been communicated to him he would not be bound by it. Undoubtedly through some oversight the letter was mislaid, but the defendant Kroenert should not suffer, because it was through no fault of his that such an accident occurred.

Under the circumstances I am of the opinion that the bank are not entitled to share in the proceeds of the moneys in Court.

In regard to the contention that Messrs. Clark, Wilson, & Stacpoole are not entitled to their 7 per cent. by reason of the fact that on 26th December they entered into a new agreement to argue this case on appeal, I was inclined to the opinion that such agreement did not deprive the solicitors of their 7 per cent. commission, and was further of the opinion that the $200 mentioned in the agreement as a fee was most inadequate, and that the solicitors could not

have intended to have entered into an agreement to deprive themselves of the 7 per cent. commission on the fruits of the litigation; but Mr. Pattullo, in his affidavit, swears that he was advised by both the defendants, and believes that the intention between the parties as expressed in the agreement of 26th December, 1902, was that the solicitor should have a fee of $200 and disbursements and nothing more, all former fees between the solicitors and defendants having been settled up to that date. This is in evidence before me, and neither in the affidavits of Mr. Clark or Mr. Stacpoole is this statement denied, but Mr. Stacpoole's affidavit rather corroborates the view taken by defendants as to the meaning of the agreement of 26th December, 1902.

Therefore, upon the evidence before me, I feel compelled to hold that the solicitors are only entitled to the sum of $200 and whatever disbursements, if any, they incurred.

The order for distribution will therefore be as follows: (a) to Messrs. Clark, Wilson, & Stacpoole the sum of $200, and whatever disbursements, if any, they have incurred; and (b) the balance of the said gold dust to Messrs. Pattullo & Ridley, attorneys and agents for the defendant Andrew J. Kroenert; and I am of opinion that the Canadian Bank of Commerce should pay the costs of and incidental to this application, and that the stop order obtained by them in this case, if necessary, be vacated and set aside.

The Canadian Bank of Commerce and Clark, Wilson, & Stacpoole appealed from the order of MACAULAY, J., to the full Court.

O. H. Clark, K.C., and F. J. Stacpoole, for the appellants.

J. B. Pattullo, for defendant Kroenert.

DUGAS, J.:—I have read carefully the record in this case and the reasons of my brother Macaulay in rendering his judgment, and I am at a loss to find anything which would justify either the reversing or the varying of the same.

I am therefore of the opinion that the said judgment should be confirmed with costs.

MACAULAY, J., retained his former opinion.

CRAIG, J., dissented, giving reasons in writing, in which he cited on the question of solicitor's lien, Armstrong v. Storer, 27 Beav. 471; In re Wadsworth, 34 Ch. D. 155; Wardell v. Trenouth, 8 P. R. 142; Bell v. Wright, 24 S. C. R. 656; Yemen v. Johnston, 11 P. R. 231.

His conclusion was that the appeal should be dismissed in so far as the judgment affected the claim of the bank, but it should be allowed in so far as it affected the claim of the solicitors Clark, Wilson & Stacpoole, with this provision, that an issue be directed to try whether or not the moneys claimed have been paid by Faulkner and Kroenert; that the costs should be paid by the bank so far as their appeal was concerned, and the costs of the appeal, as they affected the claim of Clark, Wilson, & Stacpoole, should be determined by the result of the issue after trial.

Order of MACAULAY, J., affirmed; CRAIG, J., dissenting.

YUKON TERRITORY.

OCTOBER 2ND, 1905.

FULL COURT.

RE REX v. FLYNN.

Justice of the Peace — Jurisdiction — Summary Trial — Charge of Keeping Common Gaming House—Interpretation of Criminal Code.

Appeal by defendant from order of CRAIG, J., 1 O. L. R. 388, dismissing a motion by defendant for production to T. A. Wroughton, an inspector of the North-West Mounted Police, to prohibit him from summarily trying defendant upon a charge of keeping a common gaming house.

H. Bleeker, for the appellant.

J. B. Pattullo, for the Crown.

DUGAS, J.:—Under the heading of "Disorderly houses defined" at sec. 195 of the Criminal Code, a common bawdy

house, a common gaming house, and a common betting house are defined.

Section 198 enacts that every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy house, a common gaming house, or a common betting house, as hereinbefore defined. This section is preceded by the words "keeping a disorderly house."

One Frank Flynn was prosecuted before Mr. Inspector Wroughton, an officer of the Royal North-West Mounted Police, having the jurisdiction of two justices of the peace, and a writ of prohibition is sought to prevent him from hearing and determining the charge in a summary way and without the consent of the accused, it being alleged that, notwithstanding secs. 783 and 784, this offence is not one upon which a magistrate has an absolute jurisdiction.

The articles already cited, with that concerning vagrancy, sec. 207, embody all the law concerning the keepers, inmates, and frequenters of disorderly houses.

The question being brought before my brother Craig has been decided against the contentions of the accused, and the writ of prohibition was refused.

If it were not for the judgment which has been rendered to the contrary by the majority of the Judges of the Court of King's Bench in the Province of Quebec in The Queen v. France, 1 Can. Crim. Cas. 321, I would in no way hesitate to confirm this decision of my learned brother.

In that case, in a long judgment for the majority of the Court, by the late Mr. Justice Wurtele, it was decided that under the term "disorderly house" was not included the offence created by sec. 196 as being one over which the magistrate has an absolute jurisdiction.

However, I must say that, notwithstanding all the deference which we must have for the views expressed on the subject by the highest tribunal, I have not been able to accept their way of reasoning, as I cannot see that the principle expressed in the Latin dictum "noscitur a sociis" receives its application by the fact that the words "disorderly house" in sec. 784, preceding the words "house of ill-fame or bawdy house," are restricted in their meaning, and can only embrace houses of the nature and kind of a house of ill-fame or a

bawdy house, and do not comprise common gaming houses, which are houses of a different nature and kind.

Against that I cannot help admitting the reasoning of Mr. Justice Bossé on the point, who differed from his colleagues. Like him, I believe that the rule of associated words if applied in this case would have the effect of striking out of paragraph (f) of sec. 783 the words "disorderly house," which would no longer have any meaning, and would be a dead letter, but, in the interpretation which the defence submits, it would be necessary to say that a "disorderly house" does not mean "gaming house," etc.

The statute at sec. 195 takes a special care to declare by the heading that disorderly houses are defined thereafter, and in that is included, at sec. 196, the common gaming house.

The law being so clear as to what is the meaning of a disorderly house, under secs. 195 to 198, inclusively, I am at a loss to find that when a party is indicted under those sections either for keeping a disorderly house, a house of ill-fame, or a bawdy house, he can contend that he does not fall under that definition, and I do not see why the keeper of a betting house is not also included in the same.

I must say that I cannot add a word which would better express my opinion on the subject to what Mr. Justice Bossé has said.

At the same time my learned brother will permit me to say that I would not accept as a proper argument the fact that the question never was raised specially in the province of Ontario if it be to lead us to believe that because it has happened so this should be the law.

With all due deference to the high standing of the legal profession in the province of Ontario, I would not feel disposed to consider in that light any question of law brought before us.

I am therefore of the opinion that the order of the learned Judge should be affirmed with costs in both Courts.

MACAULAY, J., gave reasons in writing for the same conclusion.

CRAIG, J., concurred, retaining his former opinion.

YUKON TERRITORY.

OCTOBER 2ND, 1905.

FULL COURT.

UNITED STATES SAVING AND LOAN CO. v. RUTLEDGE.

Foreign Judgment—Action on—Statute of Limitations—Absence of Defendant beyond the Seas—C. O. ch. 29, sec. 1—21 Jac. I.—4 & 5 Anne—Construction—Repeal.

Appeal by defendant from judgment of CRAIG, J., in an action begun on 15th July, 1902, brought on a foreign judgment recovered in one of the United States of America on 19th December, 1894.

C. W. C. Tabor, for defendant.

J. K. Sparling, for plaintiff.

MACAULAY, J.:—It is admitted that, for the purposes of suit, a foreign judgment amounts to a simple contract debt upon which action must be brought within 6 years after the cause of action arose.

The defendant came into this country, or within the jurisdiction of this Court, about the month of August, 1897. There was some evidence to shew that in 1896 defendant might have crossed the boundary line, although he was not sure that he had done so, and if he had done so it was only on an excursion which lasted for a few hours, which in my opinion, would not have been sufficient to have brought him within the jurisdiction of this Court.

The only defence set up to the action is that of the Statute of Limitations. By sec. 1 of ch. 29 of the Consolidated Ordinances of the Yukon Territory, it is provided as follows: "All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract without specialty, shall be commenced within six years after the cause of such action arose." The defendant alleges that, as more than 6 years have expired since the judgment was obtained against him upon which this action was brought, the plaintiff is barred by reason of the provisions of sec. 1.

The laws in force in England prior to 15th July, 1870, became a part of the laws of the North-West Territories, and consequently a part of the laws of this Territory, in so far as they have not been altered by the Ordinances of the North-West Territories or of our Ordinances since that date; consequently all the laws in regard to the limitation of actions in force in England on 15th July, 1870, must be considered as much a part of our laws as if they had actually been passed by the legislators of the North-West Territories, unless altered by subsequent legislation. Therefore, the statutes 21 Jac. I. and 4 & 5 Anne are still in force in this Territory, except as altered by ch. 29.

The statutes 21 Jac. I. and 4 & 5 Anne were separate and distinct statutes. The statute of James limited the time within which certain actions should be brought, and the statute of 4 & 5 Anne simply suspends the statute of James in regard to the time within which actions should be brought in case the person or persons against whom the action is brought is, at the time, beyond the seas, until there is a return of such person from beyond the seas. It is admitted that the term "beyond the seas" has been established by ample authority to mean beyond the jurisdiction of the Court in this country, and that a person going from the United States into Canada, or vice versa, would be, for the purposes of the action, a person "beyond the seas" or "beyond the jurisdiction of the Court."

The statute 4 & 5 Anne was not inconsistent with the statute 21 Jac. I. nor repugnant thereto, and the two statutes could clearly run concurrently and be in force at the same time.

It is argued that ch. 29 of our Ordinances repeals 21 Jac. by implication, or so much thereof as is inconsistent with ch. 29, because it is a well known rule of law that where two Acts are inconsistent or repugnant the later will be read as having impliedly repealed the former; but the Courts must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together, before they can, from the language of the later, imply the repeal of an express prior enactment.

I would not like to state that ch. 29 of our Ordinances repealed 21 Jac. I., because, if such was the intention, then all the Acts in regard to the limitation of actions which would be inconsistent with ch. 29, and which were in force in the

North-West Territories before the passing of ch. 29, would be also repealed, and if such were the intention I do not think the legislature accomplished what they intended to accomplish, because sec. 1 of ch. 29 is not broad enough, in my opinion, to warrant the Courts in coming to a conclusion that it was the intention of the legislature to so repeal all the Acts in respect to limitation of actions which were in force up to the time of the passing of this Act. At any rate it could not have the effect of repealing any Act or portion of an Act which is not inconsistent or repugnant to the present Act.

I cannot see wherein 4 & 5 Anne could in any way be more inconsistent or repugnant to our Ordinance respecting limitations of actions, viz., ch. 29 of the Consolidated Ordinances of the Yukon Territory, than it would be repugnant or inconsistent with the statute of James. The two, in my opinion, can stand together, and consequently, in my opinion, there is nothing in ch. 29 of our Ordinances which could in any way imply a repeal of the statute of Anne.

Being of opinion, therefore, that the statute of Anne is still in force in this Territory, I must hold that the plaintiffs would be within their rights in bringing an action against the defendant within 6 years after his coming into this Territory, or bringing himself within the jurisdiction of the Court, and consequently, in my opinion, the trial Judge arrived at the proper conclusions in his judgment, and this appeal should be dismissed with costs.

CRAIG, J., concurred, retaining his former opinion.

DUGAS, J., dissented, giving reasons in writing.

YUKON TERRITORY.

CRAIG, J. NOVEMBER 20TH, 1905.

CHAMBERS.

CAMERON v. RUTLEDGE.

Mortgage—Action for Foreclosure—Extension of Time for Redemption by Second Mortgagee.

Motion by defendant Wills to extend the time for redemption in a mortgage action for foreclosure.

F. J. McDougal, for defendant Wills.

F. J. Stanpoole, for plaintiff.

CRAIG, J.:—This action is brought upon a mortgage for foreclosure, defendant Rutledge being the mortgagor, defendant Wills being a subsequent incumbrancer by mortgage. Rutledge appeared and entered a defence, and Wills entered an appearance but no defence. Rutledge afterwards withdrew his defence and settled, fixing the amount of the debt with the plaintiff, upon which a judgment of foreclosure was given and a date fixed for redemption.

By a rule adopted in this Territory of very general acceptance, except in special cases, two months are allowed for the redemption of mining properties, it being considered that in this country speedy judgment should be given and speedy possession of mining claims, so that they may be worked. This is necessary for many reasons which I need not here enumerate. In this case the usual two months were given. The defendant Wills at the time was travelling in Europe, and it was very difficult to ascertain his whereabouts; but he had an agent who was in Dawson this summer, and who carried on some negotiations with the plaintiff looking to a redemption. These negotiations were not completed, for some reason or other not explained to me; but, before the time expired for the final order, application was made on behalf of Wills for further time to redeem. This was granted. A second application was made and further time was granted. It was then thought that Mr. Wills would be back in Canada in time to forward the money, as his agent—Mr. Levesconte—said he would, before the last day given; but a telegram has since arrived saying that he was on the ocean and expected to arrive a day or two ago. Further time is now asked, and the material indicates that if the time is granted there is a reasonable expectation that the second mortgagee, Wills, will redeem. In this Territory we adopt the English practice of fixing one day for redemption. I think the English practice is thoroughly well established upon that point. See Platt v. Mendel, 27 Ch. D. 246, and the judgment of Chitty, J. But even in that case it was held that "while the mortgagee is prima facie entitled to a judgment in foreclosure limiting only one period for redemption both as against subsequent incumbrancers and the mortgagor, where, however, the defendants have put in a defence or appeared at the bar and have proved or offered to prove their incumbrances, and there is no question of priority between them, the Court will, at the request of the puisne incum-

brancers, but not at the request of the mortgagor, limit successive periods for redemption." In the case I am considering no request was made until the time for final order was fixed, and it is only asked now on equitable grounds, so that the second mortgagee will not be deprived of his property when he has a reasonable expectation of being able to redeem the first mortgagee; but there is clear authority that the mortgagor, upon paying interest and costs and on shewing special grounds, may have the time extended. I think the same rule should apply with more force to a second mortgagee, and I would cite for this Coote on Mortgages, 4th ed., p. 124; also Holmested & Langton, Ontario Practice, p. 931; and Cahuae v. Durie, 2 Ch. Ch. 394. In that case it was held that the Court will exercise a discretion in granting an enlargement of time for payment of mortgage money, and where a reasonable case is made out will extend his time on such terms as are considered just. Where, therefore, delay was shewn on the mortgagor's part, but he shewed a reasonable prospect of being able to pay in a few months, the principal and interest were directed to be capitalized and interest on the whole paid, and the costs of the application to be paid in a week.

In this case no funds are available now to pay costs or interest, and only a few days are asked in addition; so that the imposing of terms which would have to be observed forthwith would prevent my judgment from having any beneficial effect so far as the second mortgagee is concerned, if I did impose terms to be now performed. While I think it advisable that a short date be given for redemption in the case of mining properties, yet I think that when special reasons are shewn the time should be extended, and certainly two months is too short a time when a second incumbrancer is beyond the seas and hard to reach. Nothing is shewn to lead me to believe that the first mortgagee will suffer by the extension of time for a few days. The only answer given is, that the plaintiff has given an option to sell the property upon foreclosure, but it turns out that this option is given to the wife of the mortgagor, which makes me suspicious, and certainly the second incumbrancer, who has advanced money upon the security of this property, is entitled to far more consideration than the wife of the mortgagor, who, it is sworn, is insolvent, and against whom a judgment would be of no avail.

I therefore think upon the whole case that reasonable time should be given, and, as it appears that the second mortgagee should have arrived in New York by this time, the money can be telegraphed in or a telegram can be sent from a responsible banker that the money has been forwarded. I will, therefore, allow two weeks from the 14th instant; that is, the money must be paid into Court before 12 o'clock noon on the 29th instant, with this proviso, that if the money is actually on the way and by accident or delay fails to reach here by that date, a reasonable time thereafter will be given for the money to arrive.

All the costs of these motions to extend time will be paid by the second mortgagee, Wills.

YUKON TERRITORY.

NOVEMBER 24TH, 1905.

FULL COURT.

ADAMS v. BRITISH YUKON NAVIGATION CO.

Slip — Injury to Raft from Swells — Negligence—Onus — Rules of Navigation.

Appeal by plaintiffs from judgment of MACAULAY, J., at the trial, dismissing the action, which was brought for the recovery of damages caused to a raft of timber or cord wood floating down the Yukon river, by a steamer of the defendant company, which passed the raft, the alleged cause of the damage being a swell from the steamer improperly navigated overtaking or rushing against the raft, thereby causing it to become unmanageable and lost.

J. K. Macrae, for plaintiffs.

Arthur Davey, for defendants.

CRAIG, J.—The facts are: The plaintiffs bought a stranded raft at or near Indian River, which they reconstructed to bring to Dawson. The raft was not what might be called a solidly constructed raft, but was more in the nature of a nest or a loosely constructed raft surrounded by

booms. The raft was controlled by two sweeps, one in front and one in the rear, which were fastened in a way which plaintiffs thought to be secure upon cross-beams elevated above the raft. The steamer was going up stream, and the raft of course coming down, when they met at a point in the river near the Nine Mile Island, that is, an island about nine miles from the city of Dawson. At this point there is a bar in the river, and on both sides of the bar the water is perfectly safe and navigable for rafts, and the raft, at its option, might have taken either of the channels if its occupants had decided in time which channel they would take. It is clear to me that the man on the raft might have seen the steamer or its smoke at least 4 miles away, and they certainly could have seen the steamer itself from 2 to 2½ miles away, in time to have taken the absolutely safe channel to the right. They, however, did not take that channel, but took the channel which the steamboats take, and I think they were within their rights in so taking the channel which they did take. At the point where the steamboat met the raft and passed it, the channel was about half a mile wide. The evidence varies, but it is safe to say at least half a mile wide. There is a difference of opinion as to how far the raft was away from the steamer when she passed, the plaintiffs differing in their testimony from 50 to 150 feet. The master of the vessel, I think, shews conclusively that the boat must have been at least 150 feet away from the raft, probably 200, and I think that is about the right estimate. The steamer on approaching the raft slowed down to half speed; that is not contradicted. It is also in evidence by the master that the steamer in passing the raft turned bow on so as to throw whatever swell there was from the stern wheel away from the raft, and did not start with full speed until the stern of the vessel was past the stern of the raft—how far, it is hard from the evidence to determine. After the raft had passed the vessel about 150 feet or 200, the front boom broke down and gave way, causing the sweep to drop into the water and to become useless, and some wood escaped. It is a question whether the swell from the wheel of the steamer overtook the raft and broke it up, or whether the side swell or rebound swell from the shore caused by the steamer when going up the river, rushed back and overtook the raft. I am of opinion, upon the evidence, that the swell from the stern wheels, if it did overtake the raft, was not of sufficient force and volume to

have caused any damage to the raft. It is in evidence, and I do not think contradicted by any expert evidence, that the swell caused by the rapid revolution of the stern wheels would overtake a boat if quite close to it, and that this swell would run a little faster than the current, but that in a short time the swell would simply be carried with the current, and if the raft had passed, as this raft did, and was 150 feet away from the vessel when struck, it could not have been struck by any great swell from the stern wheel. The idea that the raft was struck by the rebound swell from the bluff is borne out by the fact that it was not the stern of the raft which would be first overtaken by the swell from the wheels, but the front of the raft, which would strike the rebound swell, which was broken up.

The duty of steam vessels to keep out of the way of rafts is both by statute regulations and by common law expressly laid down. Article 27 of sec. 2 of ch. 79, R. S. C., was cited as an absolute rule which would affect this case. The article is: "Whenever any raft is going in the same direction as another which is ahead, the one shall be so navigated as not to come within twenty yards of the other, and every vessel meeting or overtaking a raft shall keep out of the way thereof. The raft shall be so navigated and anchored as not to cause unnecessary impediment or obstruction to vessels navigating the same waters." The words "shall keep out of the way thereof," it was argued, meant that the vessel should guard absolutely the raft. I do not think that is the correct interpretation to put upon those words. I think it means that the vessel shall pass at a safe distance from the raft, and I think that that entirely depends on the precautions used on board the vessel. The question is: was the steamboat in this case navigated in a proper manner so as to avoid damage to the weaker vessel (the raft)? Next, was the raft so constructed as to withstand the ordinary perils of navigation when meeting vessels cautiously and properly navigated under the rules of navigation?

It is argued also on behalf of the defendants that when the statutory rules of navigation are invoked in a case of this nature it is incumbent upon the plaintiffs to file a preliminary act. I do not think that is so. I think that relates to collisions or accidents in the nature of collisions and not to such a case as this. In any case this is a common law action

based upon negligence, and it is clear, I think, from the authorities, that the onus of shewing negligence rests upon the plaintiffs asserting it, and they must establish a prima facie case of negligence against the defendants before they can recover or ask the defendants to rebut that prima facie case.

In Brown v. Mallett, 5 C. B., the law is laid down in this way: "There seems no doubt that it is the duty of a person using a public navigable river with a vessel of which he is in possession and has the control and management, to use reasonable skill and care to prevent mischief to other vessels." The case of Luxford v. Large, 5 C. & P. 421, was one of an action against the captain of a steam vessel for swamping a loaded wherry on the river by a swell produced by too rapid a rate of passage. It was there held that the jury, to find for the plaintiff, must be satisfied that the mischief was occasioned by the swell alone, and if they think it doubtful whether it was or not, or think that the plaintiff contributed to the injury he sustained by his own improper conduct either in mismanaging or overloading the boat, they must find their verdict for the defendant. In "The Dundee," 1 Hagg. (Adm.) 109, Lord Stowell defines nautical negligence as "a want of that attention and vigilance which is due to the security of other vessels that are navigating the same seas and which when so far neglected as to become, however unintentionally, the cause of damage to any extent to such vessels, the maritime law considers as a dereliction of a bounden duty, entitling the sufferer to reparation and damages, and this rule of course must be read in connection with the clear law that the onus is on the plaintiff to shew absence of skill and care under the circumstances of traffic on the highway." Beven on Negligence, 2nd ed., pp. 13-17, lays down this law, that "in navigating harbours and roadsteads accidents may often happen from the mere disturbance of the water caused under certain circumstances by the movements of huge vessels which may sometimes swamp small craft, and there is therefore the duty on those navigating large vessels so to moderate the force at their command as not to be injurious to small vessels using the waters" And the case of "The Nevada," 106 U. S. 154, was cited. I might also cite p. 1004 of vol. 25 of the Am. & Eng. Encyc. of Law, under the head of "Navigation," the law being there laid down thus: "The rights of a vessel to navigate public waters being subject to restrictions, they

must be exercised in a reasonable and careful manner and do no injury to others that care and prudence may avoid. A steamboat is in fault in passing by a tow or vessel moored in a narrow channel at such speed or so near as to create an unusual suction and swell beyond the power of ordinary tows or vessels as ordinarily moored to a dock, but tows must be so made up and managed and vessels along the dock so at anchor must be so moored or trimmed as to meet the contingency of being passed by other vessels in the ordinary manner, nor is a vessel bound, as a matter of law, under all circumstances, to proceed at such a rate of speed as to avoid all danger to other vessels from her swell, and if the swell and suction created by the passing vessel are those to be expected in the ordinary navigation of a rapid vessel, which is managed with prudence and constructed and equipped in a suitable manner, and if the passing vessel has no reason to apprehend that she will do an injury, and a vessel is injured thereby, the passing vessel is not responsible." There is also the case of "The Marpesia," L. R. 4 P. C. 212. This was a case of collision, and much evidence was given as to what the vessel might have done more than she did do to avoid the accident. The facts were stated by Sir James Colville thus: "What is attributed to the Marpesia by the judgment and substantially the only fault that has now been imputed to her at the bar is that she did not do something more than port her helm; that she did not take steps which it is assumed she might have taken in order to put the foresails into such a position that the full pressure of the wind whilst she was under the port helm would act upon them and also ease the pressure of the wind upon the aft sails of the vessel, the result of which operation would have been that she would have paid off more rapidly under the port helm than she did, and in that way, as it is contended, might have gone clear of the America." The finding of the learned Judge in the Court below on this point is in these words: "Now she ported her helm, but if she had accompanied that manœuvre by hauling aft the head sheets again and letting go of the lea braces (and it is to be observed that all her hands were on deck at the time), in all probability she would have avoided the collision, and at all events have placed herself in a position to have done all in her power to prevent the accident." Sir James Colville goes on and says: "It is to be observed that

the Judge does not in terms find that the collision would have been avoided if she had done that which it is stated she omitted to do. His finding is only that 'in all probability she would have avoided the collision.'" Further on in the judgment he says: "We have to satisfy ourselves that something was done or omitted to be done which a person exercising ordinary care, caution, and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be." Because the offending vessel did not do everything which it might be suggested she ought to have done she would not therefore be liable. The whole question is: was the stronger vessel navigated with ordinary skill and prudence and had the master of it reason to believe that the precaution which he did take would prevent accident to the other vessel if properly handled and so constructed as to withstand the ordinary incidents of navigation in passing a vessel so properly handled? In the first place, I think that the defendants' boat was properly handled. I think that she did all that could reasonably be expected of her in slowing down when passing the raft, and in turning her stern away from the raft so as to direct the swell caused by the wheels away from it; that the captain had no reason at all to apprehend that the swell caused by the stern wheels when the boat was started up stream at full speed would overtake and damage the raft; that he had a right to expect that the raft would be so constructed as to withstand the ordinary swell caused by a vessel going up stream at half speed, which swell would rebound from the shore and meet the raft again. I think that the master of the boat exercised all the precaution which could be expected of him, passed at a reasonable distance, and had reason to expect that the raft would be more strongly constructed than it was. I think that the raft was damaged by the rebound swell from the bluff. That is the conclusion which I come to from the evidence, and I do not think that the raft was strongly enough constructed to withstand that swell.

The rule is that when in doubt in such a case as this the defendants' vessel must get the benefit of the doubt, and there is certainly sufficient doubt in this case to cause that rule to be enforced.

I therefore think that the appeal should be dismissed with costs.

DUGAS, J., gave reasons in writing for the same conclusion.

MACAULAY, J., concurred, retaining his former opinion.

YUKON TERRITORY.

NOVEMBER 24TH, 1905.

FULL COURT.

LADUC GOLD MINING AND DEVELOPMENT CO. OF YUKON v. PRUDHOMME.

Promissory Notes — Action on — Defence — Accommodation Notes—Evidence—Set-off.

Appeal by defendants from judgment of MACAULAY, J., in favour of plaintiffs in an action upon two promissory notes.

F. L. Gwillim, for defendant.

C. W. C. Tabor, for plaintiffs.

CRAIG, J.:—The circumstances under which the notes were given were, that defendant had formerly been carrying on business with the plaintiff company and had run two accounts, one known as the store account and one as the milling account. The books shew that the notes given correspond exactly with the balances standing in these two accounts against the defendant, and the accounts are closed by the notes. The accounts, copies of which are filed as exhibits attached to the appeal book, shew that the notes were given for the balances of account, one note being dated on 1st February, 1903, and the other on 9th March, 1903. The defendant alleges that he gave these notes as an accommodation; that some time prior to the giving of the notes he had paid various sums, one sum of $600 and another sum of nearly $1,000, the latter sum being in gold dust. He proves, I think, that he had a receipt at one time for the $600 sum, which receipt was seen by the witness Fletcher, when the defendant produced the same for the inspection of the former bookkeeper of plaintiffs. Another witness also

testifies to this payment, namely, Hannen, the payment having been made by crediting Prudhomme with this sum and charging Hannen, who was in Prudhomme's debt, Hannen then having some dealings with plaintiffs which occasioned this transaction to go through in that form. No entry of this $600 is found in plaintiffs' books. Fletcher, who was a former employee of plaintiffs, says he was present when Prudhomme set up this claim in the presence of Maltby, a former bookkeeper, and of Lyons, the former manager of the company; that Lyons said it was strange, but that he would investigate the matter. Lyons has left the country and was not called. Maltby, the bookkeeper, is dead.

As to the other payment, there is no evidence but the evidence of Prudhomme himself. To confirm his story, he proves a withdrawal from the bank about the date when he alleges he made a payment of a sum about equal to the payment in gold dust, and also there is some indefinite evidence given that plaintiffs were long on cash—about the sum claimed—which overplus of cash from the book entries could not be accounted for. This, however, is indefinite. Against the evidence of the defendant we have the fact that the notes were given; that they represent a balance of account settled; that the defendant met Botsford, the general manager of the company, some time after the notes fell due, and promised to pay them; that he called upon the present bookkeeper, who was a witness, and made some demand, similar to the one he is now raising, for credit, but was not clear as to what the credits were; that he promised to go home and consult his books and return and have the matter investigated, but he never did return; that he has no books shewing any such entries; that he has lost the receipt which, he alleges, would evidence the payment of the $600. There is also this, that the denial of Mr. Botsford's evidence regarding his (defendant's) promise to pay these notes is not at all a strong denial; in fact, it is of a very negative character. The transaction regarding the $600, evidenced, as it is, by the oath of Prudhomme, by the oath of Fletcher, who says he saw the receipt, also by the oath of Hannen, who says he was charged with the sum, is hard to understand, and it is also hard to say that Prudhomme has not proved that payment. It is strange that the books of plaintiffs were not further investigated to ascertain the state of Hannen's account. It is just one of those cases where I am not prepared to say what

judgment I would have given upon these facts myself, and I certainly am not prepared to reverse the finding of the trial Judge, who heard the evidence. He is in a much better position to judge of the evidence than I can be, and not being thoroughly satisfied that he was astray upon the inferences drawn from clearly established facts, I cannot reverse; in fact, I am inclined to think that he came to the proper conclusion; that Prudhomme's own conduct militates very strongly against belief in his story. He certainly should have seen that this matter was cleaned up long ago, if his story is correct that these were accommodation notes. Why they should be accommodation notes when they closed up book accounts, I cannot see. They were given at different dates and for amounts exactly corresponding with the balances in the books.

As to the other item of $900, I do not think that is proved at all, nor the set-off sought to be established. If Prudhomme had proved the set-off he ought to have been allowed it upon the notes, but I cannot say that the trial Judge was wrong in his finding that defendant did not prove those items.

I think the appeal should be dismissed with costs.

DUGAS, J., gave reasons in writing for the same conclusion.

MACAULAY, J., concurred, retaining his former opinion.

YUKON TERRITORY.

NOVEMBER 24TH, 1905.

FULL COURT.

GRANT AND STRONG v. TREADGOLD.

Appeal—Decision of Gold Commissioner—Appeal from, to Territorial Court — Deposit of Appeal Books — Extension of Time for—Forum—Jurisdiction.

Motion by plaintiffs for an order extending the time for depositing the appeal books in this Court, upon appeal by

plaintiffs from a decision of the Gold Commissioner. The notice of appeal was properly given within the time limited by the Rules, but, owing to the employment of the stenographer of the Gold Commissioner's Court in other work, he found it impossible to complete his notes of evidence in time to have the appeal book deposited, as required by the Rules.

H. Bleecker, for plaintiffs.

F. J. Stacpoole, for defendant.

CRAIG, J.:—Rule 13 of the regulations respecting practice in the Gold Commissioner's Court provides that "the appellant shall serve the respondent or his solicitor with a copy of the appeal book, and shall file with the clerk of the Territorial Court 4 copies of the appeal book within 20 days from the filing of the notice of appeal, or within such time as the Gold Commissioner shall allow." The Rules provide that the notice of appeal shall be filed with the Gold Commissioner and security deposited at the same time that the respondent shall file his reasons against the appeal in the same place. It is argued then that this Court has no jurisdiction in the matter until the appeal books are filed and the appeal inscribed in this Court. The order in council governing the hearing and decision of disputes in relation to mining lands provides that the Gold Commissioner has jurisdiction in mining matters, and that from his final judgment there shall be an appeal to the Territorial Court. At the time that order in council was passed, the Gold Commissioner was by the Ordinance constituted a member of the Territorial Court for the purpose of hearing appeals from his own Court, but the order in council provided that as soon as a third Judge was appointed to the Territorial Court, then he should cease to act in that capacity, the Territorial Court thus constituted to be the Court of Appeal. That order in council also gave the Judges of the Territorial Court power to make general Rules affecting the practice, and Rule 13 is one of the Rules so made. The attending appellants in this case are in a difficulty owing to the fact that the Gold Commissioner is absent from the Territory and cannot be applied to to grant the extension, which he doubtless would grant under the circumstances. It is argued, however, that this Court has no jurisdiction to entertain the motion; that not only does Rule 13 provide that the application shall be made to the Gold Commissioner and to no one else, but that

under our own Rules, which are embodied in the practice by general Order, the Court to apply to is the Court appealed from; that there is no provision anywhere providing for application to the Court appealed to.

Counsel upon the argument did not cite any authorities at all, but I have found two cases which seem to me to be very strong upon this point; first, the case of Owen v. Sprung, 28 O. R. 607. That was a case of an appeal from a Division Court in Ontario to the High Court of Justice, Divisional Court, and there it was held that "where, through the delay of the clerk in furnishing a certified copy of the proceedings, the appellant in a Division Court action was unable to file the same within the two weeks prescribed by 58 Vict. ch. 13, sec. 47 (4), while the junior County Court Judge refused to make an order allowing any other period for so doing, the Court had no jurisdiction to grant relief." It was also held that "application might be made to the senior County Judge." That was a case exactly, it seems to me, in point with this one, the facts being similar and the conditions of the law being similar, there being no provision there for any application to the court of appeal in the case until the case was inscribed in the court of appeal. The statutory provision referred to was, that "the appellant shall within two weeks after the date of the decision complained of, or at such other time as the Judge of the said County Court may by order in that behalf provide, file the said certified copy with the proper officer of the High Court, and shall thereupon set down the cause for argument at the first sittings of a Divisional Court which commences," etc. Under that it was held as I have cited. There is also the case of Wheeler v. Gibbs, 3 S. C. R. 374. That was a controverted election case, and the head-note is: "On a motion to quash the appeal on behalf of the respondent on the ground that the appellant had not, within three days after the Registrar of the Court had set down the matter of the petition for hearing, given notice in writing to the respondent or his attorney or agent of such setting down, nor applied to and obtained from the Judge who tried the petition further time for giving such notice, as required by the 48th section of the Supreme and Exchequer Courts Act; held, that this provision of the statute was imperative; that the giving of such notice was a condition precedent to the exercise of any jurisdiction by the Supreme Court to hear the appeal; that the appellant having

failed to comply with the statute, the Court could not grant relief under Rule 56 or 69; and that, therefore, the appeal could not then be heard, but must be struck off the list of appeals." The Court, while regretting to have to come to the conclusion which they did, did come to it because they felt that the Rule was imperative and that the Court had no jurisdiction.

That the Court appealed from is the proper Court to apply to, apart from the rule, I think is very clearly settled by the various English decisions, particularly the cases of Hammill v. Lilly, 19 Q. B. D., and Poloni v. Gray, 12 Ch. D. 446. In any other cases which I have read, where the Court above has either granted stay of execution or leave to appeal, there has always been an alternative power in the Court; that is, the Rule has provided for an application either to the one Court or to the other. In this case there is no rule providing for any application to this Court.

Attention has been directed to the fact that the Rules affecting the procedure before the Gold Commissioner's Court provide, by Rule 16, that matters of procedure not provided for in the Ordinance governing the hearing and decision of disputes in relation to mining lands in the Yukon Territory and in these Rules shall be governed by the procedure in force in the Territorial Court of the Yukon Territory. One of the Rules of the Territorial Court is that the Court or a Judge shall have power to extend or abridge the time fixed by the Territorial Court Rules for the doing of any act, and it is argued that under that Rule, 555, this Court has power now to abridge the time for doing any act in the Gold Commissioner's Court. The distinction which I make is this, that, if this case were a case in the Territorial Court now, Rule 555 would probably apply, but it is a case in the Gold Commissioner's Court, and is not yet a case in the Territorial Court. Therefore, the Territorial Court has no jurisdiction to apply its own Rules to this case. The Gold Commissioner in dealing with the matter might apply the Rules of the Territorial Court on the application either to extend or abridge the time, but this Court has no jurisdiction. By Rule 5 of the Ordinance it is provided that the notice of appeal shall be given within 20 days from the day upon which the judgment appealed from is signed, or within such further time as the Gold Commissioner or a Judge of the Territorial Court may allow, and it is argued from that

Rule that the Territorial Court has jurisdiction. But I think that the Rule only applies to the particular case which it is meant to cover, that is, leave to appeal; that the appeal is still a matter in the Gold Commissioner's Court until the appeal books are entered here, and the fact that one particular Rule gives the Territorial Court jurisdiction to extend the time for appeal does not affect the other Rule, which provides for the time for filing the appeal books in this Court, and I therefore think that this Court as a Court cannot entertain the application. I regret to have to come to this conclusion, because I think the parties should not be deprived of their right to appeal, but I quite conceive that I must pay heed to the old maxim that "a hard case cannot make good law." I think, however, that the jurisdiction of the Gold Commissioner is an exclusive jurisdiction, and that he is not limited to time; that is, that the application need not be made before the time expires for the filing of the appeal books.

I think there should be no costs in this case.

DUGAS, J., gave reasons in writing for the same conclusion.

MACAULAY, J., concurred.

YUKON TERRITORY.

NOVEMBER 24TH, 1905.

FULL COURT.

CARPENTER v. CALLIGAN.

Mines and Minerals—Water Regulations — Water Rights — Grant of, by Mining Recorder—Protest — Jurisdiction of Gold Commissioner—Judicial Determination — Authority in Ministerial Capacity—Diversion of Water.

Appeal by plaintiffs from judgment of the Gold Commissioner delivered on 19th August, 1904, on a protest heard before him over certain water grants under the water regulations in force in the Yukon Territory.

H. Bleecker, for plaintiffs.

F. L. Gwillim, for defendants.

MACAULAY, J.:—On the argument of this appeal a question arose as to the jurisdiction of the Gold Commissioner to hear and dispose of protests that might come before him on applications for water rights, and with this question I will firstly deal.

Section 1 of the water regulations of 3rd August, 1898, provides that "a mining recorder may, upon application hereinafter mentioned, grant to any person or persons for any term not exceeding 5 years, or, in special cases, for such length of time as he may determine, the right to divert and use the water from any stream or lake at any particular part thereof, and the right of way through and entry upon any mining ground for the purpose of constructing ditches and flumes to convey such water," subject to certain provisions mentioned in the section.

Section 2 of the regulations provides that "20 days' notice of the application shall be given in accordance with form M in the schedule to these regulations, by affixing the same to a post planted in some conspicuous part of the ground, and a copy thereof conspicuously posted upon the inner walls of the mining recorder's office, and any person may protest within such 20 days, but not afterwards, against such application being wholly or partially granted."

It was contended on the argument that, under the regulations, if a protest were entered as provided by sec. 2, it should first be heard and disposed of by the mining recorder, and that an appeal might be taken from his decision to the Gold Commissioner.

Under the provisions of the mining regulations, the Gold Commissioner is a mining recorder at the place where he may be residing within the mining district, but under the regulations an Assistant Gold Commissioner has been appointed, whose duties are ministerial or administrative, and, according to the division of duties arranged or decided upon between the Gold Commissioner and the Assistant Gold Commissioner, the Gold Commissioner himself assumes the judicial duties of the office, and the Rules governing the hearing and decisions of disputes in relation to mining lands in the Yukon Territory are approved by order in council of 18th March, 1901. Section 1 of those Rules provides that "the Gold Commissioner shall have jurisdiction to hear and determine judicially all matters in difference in regard to entries for mining claims under regulations or in any way re-

lating to mining property or mining rights upon Dominion lands in the said Territory;" also to have the further jurisdiction given to him by said section. Sub-section 2 of sec. 1 states that "for the purposes of this section the expression 'mining property' shall include every mineral claim, ditch, mill-site, or water-right used for mining purposes, and all other things belonging to a mine or used in the working thereof." Consequently, by that section, the Gold Commissioner is given jurisdiction to hear and determine judicially all matters in dispute regarding water rights used for mining purposes.

It has been contended that, as it is merely a protest that is provided for by sec. 2 of the water regulations, the disposition of such protest is purely a ministerial act, and should be decided by the mining recorder representing the Crown, or the Minister of the Interior, the Assistant Gold Commissioner having been the mining recorder, in the present case, who represented the Crown; and that, consequently, the Gold Commissioner had no jurisdiction to hear and determine the matter judicially, sitting as a Court, under the provisions aforesaid.

Lindley on Mines, at p. 712, distinguishes between an adverse claim and a protest, as these two terms are applied to and understood in relation to the mining regulations of the United States. He says: "An adverse claim is based upon the assertion of an adverse right. A protest is not necessarily based upon any asserted right. Often a protestant is a mere volunteer, an amicus curiæ, who calls the attention of the department to an alleged non-compliance with the law on the part of the applicant, which otherwise might be overlooked, or raises the issue as to the character of the land, in the ultimate determination of which issue the protestant may or may not have an interest proximate or remote;" and hold that proceedings under a protest are merely ministerial and are decided without any reference to the Courts, but that proceedings under an adverse claim are judicial and must be decided by the Courts.

In my opinion, our regulations differ from those in force in the United States, and to which Lindley refers. The only means that is provided for bringing matters in dispute before the Courts is under sec. 2 of our water regulations, which provides that a protest may be entered.

I have carefully examined the regulations and have endeavoured to find some authority that would assist me in forming a judgment or coming to a conclusion as to their true meaning, but I have been unable to find anything beyond what is found in the regulations themselves.

I think the word "may" in sec. 1 of the water regulations is permissive and not imperative. I am of the opinion that an application, when made to the mining recorder, if not protested as provided by sec. 2 of the regulations, may be disposed of by him as an administrative or ministerial act, but when a protest is entered under sec. 2, then his authority for disposing of such application is suspended until such protest is disposed of in the Courts judicially by the Gold Commissioner sitting in his capacity of Judge, as provided for by sec. 1 of the regulations governing the hearing of disputes in relation to mining lands in the Yukon Territory.

I think we have no such distinction as they have in the United States between the terms "protest" and "adverse claim." I am of opinion, however, that when the Gold Commissioner so sits, he sits in a judicial capacity only to dispose of the legal rights between the parties. If on the hearing before him he concludes that the protestant has some vested right which is being interfered with (if the application of the applicant should be granted), he should so find, and in such case should recommend to the mining recorder that if such application be granted to the applicant, it should be granted only subject to the rights of the protestant, or not granted at all if it absolutely infringed upon or affected the right of the protestant.

If the Gold Commissioner finds on such hearing, on the evidence before him, that the protestant has no such right that is being interfered with or infringed upon by reason of the applicant's application, he should so find and dismiss the protest, and should then recommend to the mining recorder that such grant should be issued accordingly. I think, however, the Gold Commissioner exceeds his authority when he goes beyond such directions and attempts to issue such grant to the applicant, or otherwise dispose of the rights between the parties absolutely, as a ministerial officer. He is simply, in my opinion, acting in a judicial capacity, and has no ministerial functions when hearing such protest, and consequently no right to make directions as a ministerial officer.

It is admitted, of course, and therefore it is not necessary to use any argument to shew, that the owners of hillside or bench claims, as such, are not entitled to water passing their claims in the same manner as is the owner of a placer creek claim, but must make application and obtain grant for water right before being entitled to same.

Those are the conclusions I have arrived at in regard to the jurisdiction of the Gold Commissioner, after having given the matter the most careful consideration and thought that it was possible for me to bring to bear upon the subject.

Having come to those conclusions, I will discuss the merits of the case before me.

The plaintiffs in the present case received, on 7th April, 1904, the right by water grant to divert 200 inches of water for 7 years from number 2 above discovery on Lovett gulch. This grant was issued, however, subject to the renewal of a water grant issued to defendants, should it be found advisable by the Department to issue the same. The defendants, however, did not ask for a renewal of the water grant they already had, which provided that they should take certain waters from a point of diversion on number 1 on Lovett gulch, as provided in their former grant, but have asked for the issue to them of a grant for the right to divert the water from a point on number 4 on Lovett gulch, above the point of diversion of plaintiffs' grant.

It is admitted by all parties that there is not, at any time, more than 200 inches of water to be obtained from the said gulch. It was further admitted by defendants, in their evidence, that if they were allowed to take their water from a point on No. 4, above the point of diversion of the plaintiffs on No. 2, they would obtain some of the water that plaintiffs otherwise would get by seepage and otherwise.

It was argued on behalf of defendants that they were only asking for unappropriated and unentered water, and that therefore, if their application were granted, it would not interfere with defendants, who had the prior right, as their grant would be subject to plaintiffs' grant; but that, if plaintiffs found that they interfered with them, they could take steps to protect themselves. They admit, however, that there is no more water, as before stated, at any time, than 200 inches to be had from that source of supply, and that if their application is granted it will necessarily prevent plaintiffs from obtaining the water they are now entitled to.

That being the case, I am of opinion that, if such grant is issued to defendants, the vested rights of plaintiffs under their grant will be interfered with, and that, consequently, the application of defendants to divert water from No. 4 above should not be entertained.

For the reasons above given, I think the learned Gold Commissioner exceeded his jurisdiction in attempting to dispose of the water in the manner he has done in his judgment. He should have confined himself to a decision on the rights of the parties on the protest before him, and he exceeded his authority in going beyond that and attempting to act in an administrative capacity, when he should have only acted judicially.

I am of the opinion, for the reasons above stated, that the appeal of plaintiffs should be allowed, and that the application of defendants should not be granted by the mining recorder, as, if granted, it would affect injuriously the plaintiffs in the enjoyment of their vested rights under their grant of 7th April, 1904. The plaintiffs should be entitled to costs of this Court.

DUGAS and CRAIG, JJ., concurred, each giving reasons in writing.

YUKON TERRITORY.

MACAULAY, J. NOVEMBER 27TH, 1905.

CHAMBERS.

CARBONNEAU v. LETOURNEAU.

Fraudulent Conveyance—Summary Application by Judgment Creditors to Declare Property Conveyed by Judgment Debtor Liable to Execution—Evidence—Partnership—Company—Fraud—Suspicious Circumstances—Issue Directed.

Application by way of originating summons granted on 8th September, 1904, on behalf of defendants (judgment creditors) directed to the plaintiff Belinda A. Carbonneau (judgment debtor), personally and as agent of the Klondike

Venture Gold Mining Company, Limited, to shew cause why the property embraced in a certain conveyance or transfer made by her to the company, or a competent part thereof, should not be sold to realize the amount to be realized under the execution issued on the judgment against the lands, goods and chattels of plaintiffs on 7th September, 1904.

Auguste Noel, for defendants.

J. B. Pattullo, for plaintiffs and the company.

MACAULAY, J.:—After the launching of the application herein, and on 9th June, 1905, the Klondike Gold Venture Company, Limited, conveyed the property in question to a company known as the Canadian Gold Mining Concession Company, Limited, and on the return of the summons before me I granted an enlargement and directed defendants to serve the last named company with a copy of the originating summons and affidavits, formerly directed to be served on the plaintiff Belinda A. Carbonneau, and the Klondike Venture Gold Mining Company, Limited. Service was duly effected, and on 8th November last the motion was argued before me. Affidavits of the defendant Bernier, Wilfrid Thibo, Auguste Noel, Alice Merrifield, Albert Ferry, and John Cormack were read on behalf of the applicants; also the cross-examination of Belinda A. Carbonneau on her affidavits used on the motion; and, on behalf of plaintiffs, the affidavits of J. B. Pattullo, Belinda A. Carbonneau, and the exhibits therein referred to.

On 8th June, 1904, defendants obtained a judgment against plaintiffs in the Supreme Court of Canada directing a reference in the above-named action to the Territorial Court of the Yukon Territory, and also a personal judgment against the plaintiffs for costs. Through some error Mr. A. B. Aylesworth, counsel for plaintiffs, apparently wrote to the plaintiff Charles E. Carbonneau on 27th June, 1904, informing him that plaintiffs' costs in all the Courts were to be paid out of the moneys in Court, and that defendants would have to pay their own costs. The letter is produced as an exhibit to one of the affidavits on behalf of plaintiffs, and, although the signature of Mr. Aylesworth is not proven, I have no reason to doubt the genuineness of the letter.

On 22nd July, 1904, plaintiff Belinda A. Carbonneau conveyed to the Klondike Gold Venture Company, Limited, the property above described.

On 12th August, 1904, the judgment of the Supreme Court of Canada was entered in this Court, and on 7th September, 1904, an execution was issued against the lands, goods and chattels of plaintiffs for $6,222.39—for costs in the above-named action of Carbonneau v. Letourneau.

The plaintiff Belinda A. Carbonneau, in her affidavit filed in opposing this application, states that in the month of June, 1904, she met one Schneider in the city of New York, in the United States of America, and entered into an agreement with the said Schneider and her husband, Charles E. Carbonneau, to sell the above-mentioned property with other properties in the Yukon Territory, to a company to be formed by them, for $25,000; that she received at the time of the agreement for sale $4,000 in cash; and that certain provisions, as mentioned in her affidavit, were to be made for the balance of the payments. On cross-examination on her affidavit she states that her husband and Schneider were to go to England to form a company, and that the option she gave to them at that time, by way of authority to form that company, was in the form of a letter, but she also gave her husband a power of attorney to make any alterations he saw fit on her behalf. She afterwards received a cablegram from her husband asking her to transfer the property to the Klondike Gold Venture Company, Limited, which transfer she duly made on 22nd July, 1904; and at the time of the transfer she did not knew that defendants, or any other persons, had a judgment against her for costs, or that she owed money to any person.

The deed of incorporation of the company, or alleged company, is produced and differs very materially from the statements made by Belinda A. Carbonneau in her affidavit and on cross-examination. It is dated 16th April, 1904, and purports to have been made between the parties mentioned therein and Belinda A. Carbonneau. It is known as the "Klondike Gold Venture Company" and not as the "Klondike Gold Venture Company, Limited," and in it the consideration to be paid to Belinda A. Carbonneau is stated to be the sum of $50,000. The said Belinda A. Carbonneau enters into agreements in this deed of partnership, but it is not executed by or on behalf of her. Then a transfer is produced from that company to what is known as the Canadian Gold Mining Concession Company, Limited, dated 9th June, 1905. This transfer was made after the execution was issued

out of this Court on behalf of defendants and a caveat filed in the land titles office in this Territory by defendants, so that, so far as the latter company is concerned, they accepted the conveyance with full notice of the claim of defendants, and stand in no better position than the Klondike Gold Venture Company stood in.

In order to succeed on this application defendants have to allege and prove fraud on behalf of plaintiffs.

This is all the material I have before me on this application, and the great variance between the statements made under oath by Belinda A. Carbonneau and the alleged deed of partnership which is produced, to say the least, raises a great suspicion in my mind as to the genuineness of the transfer, because this partnership purports to have been entered into months before she states that she ever gave any authority to Schneider or her husband to form a company; and, although she swears she did not know at the time she transferred to this company that there was any judgment against her for costs, and her reasons given for such belief convince me that she did not believe there was a personal judgment against her, still she knew defendants claimed a personal judgment against her for costs.

The deed from her originally was not made to the company or partnership, as is shewn by the deed of partnership itself, but to a limited company by the same name. This, of course, may have been an error. I was so convinced of this that, on an application made before me, I allowed the correction to be made in the deed, believing, as I still believe, that it could not affect the rights of defendants.

On reading all the material before me I have the greatest suspicion created in my mind as to the genuineness of the partnership formed between Belinda A. Carbonneau and the other parties named therein, and also as to the deed of transfer made by her to that partnership. However, as I understand the law, fraud must be actually proven before an applicant is entitled to succeed on an application of this kind. There may be a possibility that plaintiffs may be able to explain the suspicious circumstances, and I believe that it is my duty to give them an opportunity. The authorities are so strong on the question of proof of fraud that, although, as above stated, the greatest suspicion has been raised in my mind as against plaintiffs, I do not think I should dispose of the matter on this application.

Under Rule 246 of our Judicature Act I have the right to direct the trial of an issue between the parties "for the purpose of ascertaining the truth of the matters in question, and whether the property, or the debtor's or other persons' interest therein, is liable for the satisfaction of the execution;" which issue I do direct, and also direct that all costs incurred to the present time be reserved to be disposed of by the trial Judge.

YUKON TERRITORY.

MACAULAY, J. NOVEMBER 27TH, 1905.

CHAMBERS.

KEATING v. OLSEN.

Partnership — Death of Partner—Winding-up—Laches—Appointment of Receiver—Ex parte Order—Motion to Rescind—Variation of Order—Appointment of Surviving Partner.

Application by defendant for an order cancelling an order made by MACAULAY, J., in Chambers, on 4th July, 1905, appointing Edward Ovenden Finlaison receiver of the partnership property the subject matter of this action, or, in the alternative, directing that the said order be varied and defendant Olaf Olsen be appointed receiver in the place and stead of Edward Ovenden Finlaison.

C. W. C. Tabor, for defendant.

J. K. Macrae, for plaintiffs.

MACAULAY, J.:—The application before me on 4th July last, upon which the order for a receiver was made, was an ex parte application, the defendant not being represented, and it being shewn to me by affidavit that he had left the Yukon Territory nearly a year prior to the application having been made and had not yet returned. Since the making of the order, which provided that defendant should have liberty to apply to vary or cancel upon giving 4 days' notice to plaintiffs, defendant has returned and made this application.

The first point for me to consider is, whether I have the right to discharge the order made by me on the ex parte motion before me.

In Bidder v. Bridges, 26 Ch. D. 1, on an application to set aside an ex parte order made before the Judge who had granted the order, Kay, J., at p. 3, says as follows: "And first of all it is said I cannot discharge the order. I certainly have not the smallest doubt that where an order has been obtained ex parte, upon an application to discharge that order the parties who were not before the Court have just as much right to be heard and to urge any ground for discharging the order as they would have had if they had been there when the order was made, to contend that it should not be made. If therefore for any reason this order ought not to have been made, that reason presumably not having been presented to the mind of the Judge who made the order, because the parties who were interested in objecting to the order were not there, I have no doubt the Judge who made the order is perfectly competent, on such an application as this, to discharge the order if he thinks right." I therefore take it that I have now the same right to consider this application on the material before me as if defendant had appeared on the original motion and had produced in opposing that motion the material he now produces before me in asking that the order should be discharged or varied.

The evidence now before me discloses to me the fact that defendant and the late Andrew J. W. Keating had been carrying on business in partnership in this Territory from the autumn of 1897 until August, 1901, when the said Andrew J. W. Keating was drowned off the coast of Alaska, having been a passenger on the ill-fated steamship "Islander," which foundered and sank on a trip between Skagway and Victoria in the month of August, 1901.

It also appears that previous to the partnership having been entered into between the said Keating and Olsen, when the said Olsen came into this Territory in the autumn of 1897, the said Olsen had been in the service or employment of the said Keating at Victoria in the province of British Columbia for a period of 8 years. It further appears that defendant possessed the entire confidence of the said Keating during all these years, and that no dispute had ever arisen between them.

Although the said Keating was drowned in August, 1901, no application for the winding-up of the partnership was made by his executors until July of the present year, defendant then being absent from the country owing to illness, and the said Finlaison, whom I appointed as receiver, being the attorney in fact of defendant in this territory during his absence.

There is some authority to shew that plaintiffs have been guilty of laches. Kerr on Receivers, at p. 8, says: "The Court on an application for a receiver always looks to the conduct of the party who makes the application, and will refuse to interfere unless his conduct has been free from blame." Parties who have acquiesced in property being enjoyed against their own alleged rights cannot come to the Court for a receiver. In Allcard v. Skinner, 36 Ch. D. 145, it was held, on an application to set aside a voluntary gift of property, that the plaintiff, having allowed a period of 4 years to elapse without making any application, was barred by her laches and acquiescence. Other cases were cited to me on the question of laches, but a much longer period had elapsed in those cases, and I do not think the conduct of the plaintiffs in not making a previous application for a receiver would influence my mind against them if I came to the conclusion that there had been any wrongdoing on the part of defendant.

Lindley on Partnership, at p. 535, states the law as to the appointment of receivers between partners and non-partners as follows: "When the contest as to a receiver arises between a partner on the one hand and the executors, administrators, or assigns of a co-partner on the other, the first thing to be considered is whether the person sought to be excluded from interference is a partner or not, for, whilst the Court is reluctant to exclude a partner from the management of partnership affairs, it will readily interfere to prevent other persons from intermeddling therewith." The reason given for this is that a partner is, at the outset, trusted by his co-partners and has confidence reposed by them in him, and until it can be shewn that he ought not to be allowed to take part any longer in the management of the partnership affairs, the Court will not interfere with him.

Olsen, in his affidavit before me, shews that the partnership entered into between himself and Keating in the autumn of 1897 was a successful venture, and that all matters of ac-

count between them were settled in July, 1900; that afterwards, when Keating came to this Territory in the summer of 1901, he asked to go into partnership with defendant, and a partnership was entered into between them; that Keating, after the settlement in the summer of 1900, advanced to defendant the sum of $4,000 in connection with their partnership business, which defendant, since the death of Keating, returned to his estate.

In Horrell v. Witts and Plumley, 1 P. & D. 103, it was held that "where the estate of a deceased consists of his share of a business which he was carrying on in a partnership at the time of his death, and which is continued to be carried on by the surviving partner, the Court will not appoint an administrator pendente lite against the wish of the surviving partner, unless a strong case is made that he is dealing improperly with the business."

On the application before me, I do not think that such a case has been made out as would warrant me in appointing a receiver to wind up the partnership affairs in question against the wish of the surviving partner. The evidence now before me discloses that all the debts of the partnership have been paid excepting the liability to the defendant for acting in his capacity as manager.

Had the material I now have before me been presented to me when I made the order on 4th July last, I would not have made such an order, and, on the authorities heretofore cited, I am of the opinion that I should deal now with this case as I should have done had the defendant appeared on the motion on 4th July last, and opposed the appointment of a receiver. Since, however, I made that order, which I think I was perfectly justified in making on the material then before me, I do not think I should now discharge the order as asked for by the defendant in his notice of motion, because the partnership affairs of the parties to this action are now being disposed of, or wound up, by an action instituted in this Court; but I think the order made by me on 4th July should be varied by substituting the defendant Olaf Olsen for Edward Ovenden Finlaison, and appointing him receiver in this action in the place and stead of Finlaison, and I do so order accordingly.

The costs of this motion and order should be costs in the cause, and the question of the remuneration of the receiver

should be reserved to be settled by this Court upon the passing of his accounts as provided for in the order previously made by me.

YUKON TERRITORY.

DECEMBER 1ST, 1905.

FULL COURT.

McDONALD v. KLONDIKE GOVERNMENT CONCESSION, LIMITED.

Mines and Minerals—Water Regulations—Hydraulic Lease—Water Grant—Diversion of Water.

Appeal by defendants from the judgment of the Gold Commissioner of 17th July, 1905, in favour of plaintiff in an action for an injunction to prevent the defendants, their servants, etc., from interfering with plaintiff's dam and flume, by means of which he carried water to his pump opposite hill claim No. 30 on the left limit of the hydraulic reserve, under a grant issued to him on 9th August, 1904.

C. W. C. Tabor, for defendants.

Auguste Noel, for plaintiff.

MACAULAY, J.:—The defendants are the holders of a hydraulic lease granted to them by the Department of the Interior of Canada on 12th February, 1900, of a certain parcel or tract of land on Hunker creek, near its junction with the Klondike river, in the Yukon Territory, particularly described in the lease.

The plaintiff is the owner of certain hillsides on the left limit of the hydraulic reserve, and, on 9th August, 1904, obtained a water grant from the Department of the Interior for the right to divert and use the water from the left limit of Hunker creek at a point opposite hillside No. 34 left limit hydraulic reserve, to the extent of 200 inches.

The defendants alleged that under their hydraulic lease they are first entitled to the water flowing through their

concession on Hunker creek in so far as they require it for mining purposes, and that the plaintiff's rights under his grant are subject to its requirements.

It was argued on behalf of defendants that, as they had obtained a grant of creek claims under their hydraulic lease, they were entitled, as owners or lessees, to the riparian rights of the water flowing through such creek; that, according to sec. 13 of the lease, it must clearly have been the intention of the Government to grant them such riparian rights, as the lease provides that "Her Majesty does not in any way warrant that there shall be a sufficient quantity of water in the said creeks or rivers to admit of operations under this lease," etc.,—and that, consequently, the only reasonable construction to place upon that provision would be that they are entitled to the natural flow of the water running over their ground for mining purposes, such as the owner or lessee of a creek placer mining claim is entitled to.

The mining regulations, however, provide that the owner or lessee of a creek placer mining claim shall be entitled to the ordinary flow of the water in the creek passing over his claim, for mining purposes. There is no such regulation, however, in regard to bench or hill claims, or to hydraulic reserves.

Section 10 of the hydraulic regulations provided as follows: "The lessee's right to water on his location, or to the diversion of water in connection with his operations, shall be subject to the regulations approved by order in council of the 3rd August, 1898."

It was contended by counsel for defendants that in order to arrive at a clear understanding of sec. 10 one would be obliged to add the word "the" before "water," and then the matter would be clear. If the word "the" were added, it might then mean that the lessee of a hydraulic concession was primarily entitled to the water on his claim for mining purposes, or so much thereof as he required for the purpose of mining, the same as the holder of a creek placer mining claim is entitled to. However, without that word, the regulations to my mind are not at all clear, and if that was not the intention, and they are subject to the regulations of 3rd August, 1898, then sec. 5 of those regulations provides that "every grant of a water privilege on occupied creeks shall

be subject to the rights of such miners as shall, at the time of such grant, be working on the stream above or below the ditch head, and of any other persons lawfully using such water for any purpose whatsoever."

The Gold Commissioner was of opinion that under sec. 10 of the hydraulic regulations defendants were only entitled to such water as they might apply for under the water regulations; that not having applied for any water under those regulations, their rights now to water are subject to the rights of the plaintiff to his 200 inches under his said grant.

I admit the matter is somewhat doubtful to me, because sec. 10 of the water regulations, to my mind, is anything but clear.

The defendants obtained special rights under their lease, and special privileges, and it is the policy of the law in such cases that, under such circumstances, such rights and privileges, and the provisions of such a lease, should be strictly construed.

Under the circumstances, I am not prepared to say that the Gold Commissioner was wrong in the conclusions he has arrived at, and in the interpretation he has placed upon defendants' rights to water under their lease. Being of that opinion, it is not necessary for me to consider any of the other questions raised on this appeal.

If the Gold Commissioner is right in placing the construction he has placed upon the regulations, that the defendants, not having obtained a grant to water, have no rights that are being interfered with, then this appeal should be dismissed. While having much doubt, as before stated, I am not prepared to say that the interpretation he has placed upon the regulations is not the correct interpretation to be placed upon them, and am, therefore, of opinion that this appeal should be dismissed with costs.

DUGAS, J., gave reasons in writing for the same conclusion.

CRAIG, J., dissented, giving reasons in writing.

YUKON TERRITORY.

DECEMBER 1ST, 1905.

FULL COURT.

WILSON v. GRAVES.

Writ of Summons—Service out of Jurisdiction—Order for—Setting aside—Irregularities—Waiver—Moving for Extension of Time for Appearance—Submission to Jurisdiction—Stay of Proceedings—Previous Actions Pending—Proceedings under Miners' Ordinance.

Appeal by defendant from order of MACAULAY, J., refusing to set aside order for service of process upon defendant out of the jurisdiction, etc.

F. L. Gwillim, for defendant.

F. J. McDougal, for plaintiff.

DUGAS, J.:—The defendant (appellant) is a British subject living in London, England, and, therefore, outside of the jurisdiction of this Court.

Before the issuing of the writ of summons plaintiff applied, as required by Rule 17 of the Judicature Ordinance, to Mr. Justice Macaulay for leave to serve the writ of summons to be issued, on the defendant out of the jurisdiction of this Court, and the application was supported by an affidavit of Mr. Frank J. McDougal, attorney for plaintiff. The application was granted, and 60 days were allowed by the Judge for appearance after service. However, the writ of summons was issued in the form ordinarily used when the service is to be made within the Territory, whereby the defendant is commanded to appear if he disputes the claim "within the time allowed by sub-sections 2 and 3 of Rule 3, a copy of which appears at the foot hereof."

Those sub-sections read as follows:—"(2) If the writ of summons is served within a distance of 10 miles from the clerk's office whence it is issued, the time for appearance shall be 8 days from such service, and if it is served at a distance of more than 10 miles from such office, an additional day for every additional 10 miles shall be added to such time for

appearance. (3) A Judge may by order shorten the time for appearance."

It is under this Rule that the time to appear was shortened and fixed at 60 days.

There is nothing in the writ itself which shews anything of this order, which, however, was served, I believe, upon defendant. I say I believe, because there is no return of service in the record, though the notice of motion given by defendant brings me to that inference, and also that the 60 days expired on 18th July.

In order to bring a non-resident within the jurisdiction of this Court it must be sufficiently made clear that the cause of action falls under Rule 17 of our Ordinance.

It appears that the agreement upon which the action is based was made in this Territory by one Cecil Cole with plaintiff and his assignor, but it is alleged in paragraphs 2 and 5 of the affidavit of Mr. McDougal that in making the said contract Cecil Cole acted for the defendant, Henry C. P. Graves, as an undisclosed principal, " to the best of his knowledge and belief." The two paragraphs are practically in the same words, and this is the only fact that could bring the defendant under the jurisdiction of this Court.

On 18th July, 1905, Messrs. Gwillim & Crisp, as solicitors for defendant, served a notice of motion upon plaintiff to the effect that, " by special leave of the Honourable Mr. Justice Macaulay, a motion would be made on the 19th day of July to have the writ of summons issued in this action, the statement of claim, and the service of the said writ of summons upon the defendant, set aside, as well as the order for service ex juris, or, in the alternative, for a stay of proceedings herein," upon the grounds therein mentioned, which are that the affidavit of Mr. McDougal is insufficient, inasmuch as, amongst other things, in paragraphs 2 and 3 the deponent swears to facts " to the best of his knowledge and belief," without giving reasons therefor; that the writ of summons purports to be a writ of summons for service within the jurisdiction of this Court; that the same is returnable at an earlier date than is permitted by the terms of the said order; that the said writ was not issued in pursuance of the said order; and, lastly, that there are now pending against the defendant other actions in this Court in respect of the matters referred to in the statement of claim.

On 19th July a second notice of motion was served on behalf of defendant to the effect that on Monday the 24th

day of July an application would be made for an order extending the time for appearance by the defendant to the writ of summons until the 15th day of August, 1905, or such other time as to the said Judge shall seem meet, and, in the alternative, for an order setting aside the order for service of the writ of summons ex juris, the writ of summons issued in the action, the statement of claim, and the service of the said writ and statement of claim upon the defendant, or, in the further alternative, for a stay of proceedings herein; and the grounds given (first) for the application for the extension of time are, "that the defendant's solicitors have not received full instructions from the defendant and will not receive such instructions until about the 15th day of August, 1905;" (second) for the application to set aside the writ of summons and other process in the alternative, "that the statement of claim does not disclose a cause of action within the provisions of sec. 17 of the Judicature Ordinance; that the affidavit upon which the said order was granted does not comply with the requirements of sec. 18, and does not make sufficiently to appear that the case is a proper one for service out of the Yukon Territory; that the plaintiff's action is not an action in which service out of the jurisdiction can be ordered; that paragraphs 2 and 5 of the affidavit of Mr. McDougal are insufficient, inasmuch as he deposes "to the best of his knowledge and belief," without giving reasons therefor; that the writ purports to be a writ of summons for service within the jurisdiction of this Court; that the writ of summons is not in accordance with the terms of the order granting leave to issue the same, nor in the form prescribed for such writ of summons, and is returnable on a date different to the date fixed therefor by the order;" and (third) for the stay of proceedings in the further alternative—"that actions are now pending in this Court against the defendant in respect of the matters and causes of action set forth in the plaintiff's statement of claim."

As will be seen, this new notice of motion contains all the ingredients of the first one, and is further more complete. It does not appear that there was any discontinuance of the first motion, and it is admitted by both parties that by common consent the two were submitted for adjudication as being one and the same motion.

On 19th September affidavits were produced on behalf of defendant by which it would appear that in fact there were then pending two originating summonses taken out by

the plaintiff and his assignor under the Miners' Lien Ordinance for the same causes of action. I had some doubt as to whether an originating summons taken out under this Ordinance was really an action, but by referring to the same it will be seen that it qualifies more than once such a proceeding as an "action." The definition given in sec. 2 of the Judicature Ordinance of the word "action," which includes "suit" and means a civil proceeding commenced by writ or in such other manner as may be prescribed by this Ordinance or by Rules of Court, and of the words "originating summons," which "mean a summons by which proceedings are commenced without writ," added to the sense given to the same by the Rules of the Supreme Court in England, which will be found at p. 1044 of the Annual Practice, is sufficient to dissipate all doubts on the point, and I am convinced now that there were in fact, at the time this action was begun, actions pending founded on the same causes between the same parties, and that the defendant is, in fact, entitled to a stay of proceedings.

For the better understanding of the case it must be stated here that there were two originating summonses issued, one at the instance of the present plaintiff and the other at the instance of one Thomas Wilson, who, on 12th August, 1903, assigned to the present plaintiff his interest under the agreement alleged in the said originating summons.

The order made by Mr. Justice Macaulay upon the motions of the defendant is to the effect that his application to set aside the order for service of the writ of summons, and the writ of summons itself, and the service of the said writ of summons, statement of claim, and order upon the defendant, be dismissed, and that the plaintiff be at liberty to discontinue all proceedings in two certain actions in this Court by way of originating summons between James Evans Wilson and Thomas Wilson, as plaintiffs, and Cecil Cole, H. C. P. Graves, the Treasure Hill Mining Company, and George R. Clazy, as defendants, issued on 25th Apr', 1905, and between James Evans Wilson, as plaintiff, and Cecil Cole, H. C. P. Graves, the Treasure Hill Mining Company, and George R. Clazy, as defendants, issued on 22nd April, 1905; and that all proceedings in this action be stayed until the expiration of 10 days after the discontinuance of the said two Ten actions.

It was further ordered that the costs incurred by the said discontinuance of the said two Ten actions be costs to the defendants in said actions, and that said costs, if any, be

by plaintiffs before proceeding with the present action; and it was further ordered that the costs of one application be costs in the cause to defendant in any event.

From this order defendant has appealed, basing his argument upon the points already raised in his motions, and adding to them that "the said order is against law and evidence and the weight of evidence."

I must say that I am with the appellant upon three points. I believe (first) that the judgment of Mr. Justice Macaulay goes too far when it gives liberty to discontinue all proceedings in the two originating summonses, and that the order to stay proceedings until the expiration of 10 days after the discontinuance of the said two lien actions is not the order which should exactly have been given. I also believe that costs could not be ordered to be paid upon the said two originating summonses. Those proceedings were not before the learned Judge to be adjudicated upon, and I cannot see that, upon the motions made before him in the present case, he could intervene in the other cases. I believe (secondly) that the writ of summons is not the one which should have issued, and that such writs to be served out of the jurisdiction should be varied as circumstances require so as to give proper information to the party prosecuted as to when he should appear, and avoid any possible surprise to that effect. Section 1 of the Rules of Court under the Judicature Ordinance provides for the same, and when (under paragraph 3 of Rule 3) the Judge shortens the delay within which the defendant has to appear when he lives at a long distance, such as the present defendant, the writ itself should shew it just as well as it shews by the foot-note of the ordinary form that "if the defendant is within a distance of 10 miles from the clerk's office the time for appearance shall be 8 days from service, and if served at a distance of more than 10 miles an additional day for every additional 10 miles shall be added to such time for appearance."

It seems that Rule 1 specially provides for that purpose as well as Rule 18, which declares that "every application for leave to serve out of the jurisdiction shall be before writ issued," and it is evident that, besides shewing a good cause of action, in what place or country the defendant is or probably may be found, and whether such defendant is a British subject or not, the time to appear must also be fixed if it is intended to have it shortened under paragraph 3 of Rule 3.

This is more than a wise precaution: I may say that it is a quasi absolute necessity, for it would be otherwise absurd, if not impossible, to determine how many additional "10 miles" should be added for the appearance of a defendant living somewhere in London, or in England, or at any other distant place in the world.

I have read carefully the arguments of the Judges sitting in appeal in the North-West Territories in the case of Moore v. Martin, 1 Terr. L. R., part 2, p. 236. They held there, relying upon the authority of Fry v. Moore, 23 Q. B. D. 395, 58 L. J. Q. B. 382, that the writ being regular on its face could not be treated as a nullity. I believe that upon the same principle the writ in this case must be considered as regular. I think, at the same time, that the proceedings thereunder were irregular and to such an extent that the defendant could have taken advantage of the irregularity if I did not consider that by his two motions he has waived the same. With all due deference to the views of the majority of the learned Judges sitting in the above case, I cannot help agreeing fully with what Mr. Justice Wetmore says as to the consequences of such irregularities as those which have happened in that case, and which I consider apply as forcibly in the present one. I believe that the writ of summons, which is the commencement of the action, cannot be replaced by an order of the Judge, or any other proceeding, except if otherwise provided by law. The law provides for the serving of the writ upon the defendant, not of the order shortening the time for appearance. The writ is made and the summons is issued in the name of the King, and it is that that the defendant has to obey. The command is in the writ, not in the order of the Judge, which is to the effect of purely and simply permitting that the delays in the writ be fixed so as to protect the plaintiff against too long delay as well as the defendant against too short delay.

And thirdly, I find another irregularity in the affidavit of Mr. McDougal in not disclosing his means of knowledge of the facts mentioned in paragraphs 2 and 5 thereof. This I would also consider as fatal, if there had been on this and the second points no waiver by the action of the defendant.

"Although in practice the grounds of the witnesses' information and belief are frequently not stated, nevertheless a party against whom such an affidavit is made is entitled to take the objection, and if the objection is one of substance

the Court is bound to pay regard to it:" Bidder v. Bridges, 26 Ch. D. 1; Quartz Hill Mining Co. v. Beall, 20 Ch. D. 508; Bonnard v. Perryman, [1891] 2 Ch. 269.

"And the Court of Appeal in England has commented on the irregularity of an affidavit founded upon information and belief merely, without giving the source of such information and belief:" see Re J. L. Young Manufacturing Co., [1900] 2 Ch. 753, and Lumley v. Osbourne, [1901] 1 K. B. 532. (Taken from Annual Practice, p. 637.)

Here the objection is, no doubt, one of substance, as both paragraphs contain the one averment—that the defendant was really the principal in a transaction made by one Cecil Cole in the Yukon Territory, and that therefore he is amenable before this Court. I would say, on that account, that the affidavit is substantially defective, but, by his motions—which I take to be one merged into the other—the defendant has moved, besides, for an extension of time to permit him to appear and obtain further instructions from his client. I cannot understand why such an application was made. I believe that no case will be found where a defendant has thought fit to ask for delays to appear when it is easier for him to do so than to move in the way that the present defendant has done. If to be protected against any surprise by the lack of proper and sufficient instructions, it is always an easy matter for a solicitor appearing under such circumstances to obtain the delay required, but only after a regular appearance. To raise the technical points mentioned in his motion an appearance was not needed. The defendant had the right to contest the jurisdiction of the Court by making a simple motion to that effect. He could have drawn, also, the attention of the Court to the irregularity of the affidavit, and the Court would have been bound to see whether those objections were well founded or not. This is, for the time being, all the interest which the defendant had in the case.

I have read all the books to which the Annual Practice, under marginal note 1038, refers, and which are available here. I have also carefully perused the cases in Ontario on the point, and more particularly those of Sears v. Meyers and Heath v. Meyers, 15 P. R. 381. Although the application made by the defendant in this last case for security for costs has not been considered as a fresh step by which the objection to the jurisdiction of the Court could be considered to have been waived, and although in England, in the cases of

Mayer v. Clarietie, 7 Times L. R. 40, as approved of in Firth v. Palmer, 41 W. R. 493, and Firth v. De Las Rivas, [1893] 1 Q. B. 768, it was considered that an appearance accompanied by a writing which would shew that the defendant did not intend to submit to the jurisdiction of the Court, was not a fresh step, I believe that those cases are not in contradiction of the principle re-enacted by our Rule 547, that "no application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

In the cases cited above, and others which might appear to be favourable to the defendant, such as those, for instance, which are found at p. 126 of the Yearly Practice under heading "Any other steps," it seems that the true principle is that, although the defendant may act without waiver when his position is passive, or that he has, by some proceedings, to protect himself against any attempt to get the best of him before the Court, yet if he takes, himself, any step to obtain from the same Court any intervention which would amount to a submission on his part to the jurisdiction of the Court, then he has waived whatever irregularities he might have had the right to invoke otherwise.

"Any other steps. This means something in the nature of an application to the Court, not mere negotiation between the parties:" Yearly Practice, p. 126. "Notice requiring a statement of claim. The mere filing of affidavits in opposition and application by letter under Order 64 for extension of time for defence, are not considered to be steps in the case, but such extension of time is a step if obtained by order of the Court. So is an application for security for costs. So is a summons for particulars of counterclaim. So is leave obtained by plaintiff to administer interrogatories, etc. So is an order for discovery of documents, and so is an order for delivery of pleadings." All of which is cited under cases the titles of which are given on the page above referred to in the Yearly Practice, and tend to shew that whatever is done behind the Court, without any attempt to have the Court interfere, cannot be considered as a fresh step, whilst when the contrary happens, and the Court is called to make any adjudication, then this is a step in the cause.

The application for security for costs has been considered such a step in England as late as 1892, in the case of Adams

v. Cattley, 66 L. T. 687. The judgment of Chancellor Boyd and Judge Ferguson in the case of Heath v. Meyers, above referred to, is set in opposition to that of the English case; but it is distinguished from that of Sears v. Meyers, where the waiver was admitted to have existed by an application for security for costs, whilst in that of Heath v. Meyers it was said that the defendant, being a foreigner, prosecuted by another foreigner, did not shew his intention of submitting to the jurisdiction of the Ontario Court by asking to be secured for the payment of the costs which he might have to incur to repulse the claims of the other foreigner in a Court which had no jurisdiction over one or the other. By referring to the opinions of both the Chancellor and the Judge, I think it can rightly be said that they have stretched the principle in favour of the defendant as much as they could properly do under the circumstances. Their argument is principally based upon the enunciation that it is clear that the defendant never intended to submit to the jurisdiction nor to waive his objection to it, and that in asking for security for costs he only made a demand, to which he was forced by the plaintiff himself, to the Court below which he had been irregularly brought. This case, which at all events would not be binding upon us, is, I think, the one which goes the furthest in protecting a defendant against such a waiver, and to give to it a further meaning than above would be admitting that it upsets the doctrine held in all the other cases on the point.

It will be maintained, I think, by my learned colleague Mr. Justice Craig, that the fact of protesting, at the same time that a fresh step is taken, against the jurisdiction of the Court, is a declaration that, notwithstanding, the defendant intends to reserve his rights to take advantage of all irregularities in the case; that this amounts to an appearance under protest; and that this fresh step, by moving the Court by the same motion, cannot be considered as a waiver. I fail to see in any of the cases cited anything to sustain this argument. Nowhere can I find that a defendant has been allowed to deny and accept the jurisdiction of the Court at the same time, and the fact of asking an extension of the time and a stay of proceedings in the alternative does not make, in my opinion, any difference. The motion is one and cannot be cut into pieces. The Court is asked to consider the whole of the application, and, therefore, it is moved just as

well on the objections for the irregularities as upon the demand to protect the defendant by extending the time to appear. If, instead of moving the Court on his behalf, he had simply objected to the irregularities, and then afterwards, by a new motion or by a new pleading, he had gone into the merits of the case, could it be said that he would not, by this last proceeding, have waived his technical objections? I suppose that the contrary could not be affirmed.

The demand to stay proceedings is another submission to the jurisdiction of the Court. Whatever has been said above applies with more force to this part of the application of the defendant. It is, no doubt, a fresh step, and I need not repeat the argument to shew that it is a waiver. For further authorities as to what is a fresh step in the action, and what effect it has, I would refer to the cases cited under sec. 6 of the Arbitration Act of 1889, cited at p. 549 of the second volume of the Annual Practice; also to those cited in the 1st volume of the same book under Rule 2 of Order 30, at p. 371, anno 1904.

Upon the whole, therefore, I am of the opinion that the position taken by the defendant is not sustained by the authorities, inasmuch as I consider that these two demands in his motion are a fresh step in the cause and a waiver to his objections to the jurisdiction of this Court; but, as I believe that the only order which should have been given under the circumstances was for a stay of proceedings in this present case, I think that the order of Mr. Justice Macaulay should be reformed to the effect that the proceedings in this case be stayed until further order; that the motion should be dismissed for the rest, and this without costs of this appeal, but costs in the Court below of an ordinary motion to stay proceedings in favour of the appellant, payable before 1st March next.

CRAIG, J., was of opinion, for reasons given at length in writing, that the proceedings were irregular; that there was no waiver; and that the appeal should be allowed with costs, and the order allowing service out of the jurisdiction and all the proceedings based thereon set aside.

MACAULAY, J., delivered a written opinion in which he dealt only with the question of waiver, holding that the de-

fendant by moving for an extension of the time for appearance had waived his objections to the irregularities.

The order of the Court was that pronounced by DUGAS, J.

YUKON TERRITORY.

CRAIG, J. DECEMBER 2ND, 1905.

CHAMBERS.

STONOR v. LAMB.

Costs—Motion to Stay Proceedings upon Judgment at Trial Pending Appeal—Costs in Cause.

Motion by defendants for a stay of proceedings pending an appeal to the Court en banc against the verdict for plaintiff entered in this case after trial with a jury.

F. J. Stacpoole, for defendants.

R. L. Ashbaugh, for plaintiff.

CRAIG, J.:—The order for stay was granted upon payment into Court of the amount found by the verdict, together with the costs of the trial, and upon the question of the costs of the motion for stay coming up I was asked to consider the matter more fully, so far as I could, to establish the practice here. I find that in England, under the Rule there, which is much the same as ours respecting stay, the costs of the application are usually borne by the appellant: see the cases of Cooper v. Cooper, 2 Ch. D., and Re Brighton, 52 L. T. 745. But the Court still has a discretion, and in a proper case will depart from the Rule: Adair v. Young, 11 Ch. D. 136. Our Consolidated Ordinances make the costs discretionary with the Judge, and on appeals to the Court en banc, no security for the costs of the appeal shall be required. I cannot see why the costs of a motion to stay should be made payable forthwith by the applicant when he succeeds on his motion: and when he complies with all the terms imposed by the making of the order, the successful party has ample

security, because the sum fixed, together with the costs of trial, is paid into Court to abide the result of the appeal, or a bond is given to the satisfaction of the clerk of the Court. In many cases unless a stay were granted, the appeal would be abortive and of no effect to the appellant, who might have a very good case on which to appeal. The stay is therefore a necessary motion in the cause on behalf of the applicant, who is appellant, and I cannot understand the principle upon which these costs are always to be made payable forthwith. I think the better rule would be that the costs should be taxed and paid in along with the costs in the cause to abide the result of the appeal, and that will be the order in this case.

MANITOBA.

DUBUC, C. J. DECEMBER 22ND, 1905.

TRIAL.

MALCOLM v. McNICHOL.

Negligence — Damage to Goods of Tenant on Demised Premises — Escape of Steam — Work Done by Order of Agent of Landlord—Authority of Agent—Employment of Independent Contractors — Liability of Landlord — Liability of Contractors for Work—Damages.

Plaintiff was carrying on a millinery store in Portage avenue, Winnipeg, in premises rented from defendant McNichol. The rent was $125 a month. McNichol was to heat the store properly, and it was agreed that for such heating the plaintiff was to pay $15 per month extra during the months of October, November, December, January, February, March, and April. The term commenced on 20th July, 1904. The store in question was in a block containing two other stores, and was heated by steam produced by a furnace in the basement and transmitted by pipes to radiators in the different parts of the building. The first negotiations for the renting of the premises were conducted by McNichol himself, but subsequently he left the matter in the hands of

J. B. Pepler, a real estate agent, who was authorized by McNichol to complete the arrangement about the renting. Pepler was also McNichol's agent for attending to the renting of the other stores in the same block, which was known as the Stobart block, and for collecting the rents.

During the colder months the heating was found deficient, and several complaints and requests were made by plaintiff and her sister to McNichol, who answered that he would leave Pepler to attend to it. A lease was prepared by or under the instructions of Pepler, but the plaintiff, who had been in the premises for some time, refused to sign it until the promised repairs were done. On one occasion McNichol answered that if plaintiff was not satisfied she might leave the store. This was in the early part of December, and shortly afterwards McNichol left for New York. After repeated requests to Pepler, and after Pepler had gone there and had seen that the store was so cold as to be hardly fit for occupation, he gave instructions to defendants Irvine, Mould, and Turner, members of the Standard Plumbing Co., to provide better heating in the store by putting in an additional radiator and so fixing the apparatus as to supply sufficient heat. They undertook to do it, and commenced to work on the morning of the 28th December. On the evening of that day the work was not finished, and a radiator was left disconnected with the steam pipes. But a safety valve was put on the pipe to prevent steam from escaping. The plaintiff and her sister had their bedroom in the store. About 5 o'clock in the afternoon the plaintiff discovered that water was coming from the ceiling in the workroom and was damaging the goods. She went to inform the working plumbers of the fact. They went upstairs with the caretaker, and found that the room from which the water was coming was closed, the tenant being absent. They went down into the basement and shut off the steam. The plumber was to close his day's work at five o'clock, but he remained to try to put matters in shape. He told plaintiff and her sister that the steam would be shut off for the night and the store and rooms be very cold. The plaintiff and her sister left the store between 6 and 7 o'clock and closed the doors. The plumber Fiddler, who was in charge of the work, stated that he had closed the safety valve before the plaintiff and her sister had left the store. At the request of the caretaker Hutchison, Fiddler, after going to his supper, went

back in the evening and worked a couple of hours, after which he left for the night.

When the plaintiff's sister returned in the morning of the 29th, she found that steam was escaping from the pipe; the store and rooms were filled with steam; the goods and furniture were wet and greatly damaged by steam and water. She at once called on the plumbers who were working in the basement; they came and closed the valve where the steam was escaping.

The plaintiff took advice, had the goods and furniture examined and stock taken; she afterwards had them removed to the auction room of A. H. Pulford, where an inventory was made; and after having been duly advertised, the goods were sold in bulk at 20 cents on the dollar.

The inventory shewed stock to the amount of $16,162 98.

The plaintiff alleged that her stock was injured through the negligence of the defendants in fixing the heating apparatus, and brought this action to recover the amount of the damages sustained.

H. M. Howell, K.C., and Horace Ormond, for plaintiff.

J. A. M. Aikins, K.C., and H. A. Robson, for defendant McNichol.

C. P. Wilson and A. C. Ferguson, for the Standard Plumbing Co.

DUBUC, C. J.—A large number of witnesses were examined, and the evidence is voluminous. I will not undertake to analyse and discuss it in detail. I may, however, state that some of the testimonies were unsatisfactory, and statements were made to which not much credibility can be attached. I will content myself with noticing the points raised in the case and giving my findings on the facts brought out as they appear to me sustained by the evidence.

The defendant McNichol contends that he did not authorize his agent Pepler to order the fixing of the heating apparatus, and that therefore he is not responsible for the damage caused by the accident; that, in any event, independent contractors were employed to do the work, and, if any damage was caused by the work being improperly done, or through some negligence, the contractors alone should be held liable. The other defendants submit that they did the work

under an arrangement made to please Pepler; that no positive proof has been given that the accident by which the goods were injured happened through their negligence; and that they should not be held responsible.

It is admitted that McNichol agreed to properly heat the stores.

I find that the premises were insufficiently heated, not only for delicate women, but even for any person to safely occupy them during the cold weather. I find, also, that repeated requests were made by plaintiff and her sister to Pepler and to McNichol himself to provide proper heating. I find that Pepler was employed by McNichol as his agent to attend to the renting of the building in question, collecting rents, and doing necessary things in connection therewith, including necessary repairs. I find that Pepler, after seeing for himself that the store was too cold, gave instructions to the Standard Plumbing Co. to attend to the matter and do what was necessary to furnish sufficient heat. Notwithstanding what has been stated by McNichol and Pepler as to the latter having no authority to order repairs, I consider that it was within the scope of Pepler's authority, as agent of McNichol, to instruct the plumbers to provide sufficient heating for the premises. As a landlord, having specifically agreed to properly heat the store and being paid for so doing, McNichol had a duty towards plaintiff to provide sufficient heating. It is not open to him to repudiate his obligation and say that, during his absence from the country, his agent, who had practically charge of the building, had no authority whatever to do what he, McNichol, was obliged to do under his contract, and was necessary for the heating of the store. It was shewn that Pepler had, before or about the same time, ordered some repairs to the other stores of the same block, paid for the same with McNichol's money, and what he had done in that respect had never been objected to or questioned by McNichol. Supposing the building, through any cause, had exhibited signs of falling down, threatening the lives of its inmates and of the public passing on the street, could he excuse himself by saying that his agent, in whose hands he had placed the management of the building, had no authority to take the necessary steps to prevent such a calamity? Taking into consideration the circumstances of this case, I feel compelled to find that Pepler, by reason of his agency, had authority to take the necessary steps required for the proper heating of

the premises, and to instruct the plumbers to do what work was required for the purpose.

I find that the goods of the plaintiff were injured by steam escaping from the heating apparatus, and that such escape of steam was caused by the negligence of the plumbers employed to fix the apparatus.

The plumber Fiddler says that the safety valve was closed when he left the store on the evening of the 28th December, but, as there is absolutely nothing in the evidence to shew or suggest that any person had gone into the store and had interfered with the valve during the night, it must be presumed that Fiddler was mistaken about that, that he thought he had closed it tight, while, by forgetfulness or otherwise, he must have left it only partly closed. The fact that it was found open the next morning, with evidence from the wet state of the goods that it must have been open for a considerable time, leads necessarily to that conclusion.

The onus of proof of negligence in general is on the party charging it, but under special circumstances the mere happening of an accident is sufficient prima facie evidence of negligence and imposes upon the defendant the onus of rebutting it: Addison on Torts, p. 22; Pollock on Torts, p. 508; Clerk & Lindsell on Torts, p. 467.

In Scott v. London and St. Katharine Docks Co., 3 H. & C. 596, the following doctrine was laid down: The plaintiff must adduce reasonable evidence of negligence to warrant the Judge in leaving the case to the jury. But, when the thing is shewn to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. In Gee v. Metropolitan R. W. Co., L. R. 8 Q. B., Brett, J., said at p. 175: "I apprehend that negligence consists of this: where something happens which would not happen if ordinary care and skill were used, the happening of that is evidence on which a jury may find that there has been negligence on the part of the defendant." The following cases may also be cited in support of the same doctrine: Moore v. Harris, 1 App. Cas. 326; Hossen v. Union Marine Ins. Co., [1901] A. C. 362; Canada Atlantic R. W. Co. v. Mozley, 15 S. C. R. 115; Makins v. Piggott, 29 S. C. R. 188.

In the present case the evidence does not positively shew by whom the valve was opened; but it clearly establishes that it was left open while under the management of the plumbers employed to fix the heating apparatus; it is sufficient evidence of want of care and of negligence on the part of the plumbers.

It is argued on behalf of McNichol that, if it is found that Pepler had authority to employ the plumbers to do the work required, the fact that the work was intrusted to independent contractors should exonerate him from liability for the damage caused by the accident; and certain cases were cited in support of that proposition. But it seems to me that the trend of authorities upholding a different view are more applicable to the circumstances of this case. In the Am. & Eng. Encyc. of Law, vol. 16, p. 200, it is stated that a landlord making repairs to premises rented has a duty to exercise reasonable care and cannot escape that duty by employing an independent contractor to make the repairs, unless there is an agreement between the landlord and the tenant that the repairs shall thus be made. The same principle is laid down by Pollock, C.B., in Hole v. Sittingbourne and Sheerness R. W. Co., 6 H. & N. 497, where he says: "Where a person is authorized by Act of Parliament, or bound by contract, to do particular work, he cannot avoid responsibility by contracting with another person to do the work." Lord Campbell expressed the same view in Ellis v. Sheffield Gas Consumers, 2 E. & B. He says at p. 769: "I am clearly of opinion that if a contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself."

In Halliday v. National Telephone Co., [1899] 1 Q. B. at p. 227, the following language is used by Willis, J.: "The person to whom the thing which does the mischief belongs, or who has caused it to be put, or who has maintained it, is liable, no matter whom he has employed to do it." Vide also Hughes v. Percival, 8 App. Cas. 443; Black v. Christ Church Finance Committee, [1894] A. C. 48.

Under the above authorities, I do not see how, in this case, McNichol can escape responsibility for the damage done, because he employed contractors to do the work. He must be held liable for the want of care and negligence of his contractors. The other defendants, members of the Standard Plumbing Co., who were employed by McNichol to do

the work, must also be held liable, because it was through their negligence and carelessness that the accident happened. Beven on Negligence, p. 731, in commenting on the maxim respondeat superior, says that its application depends on the question whether the superior has personal control or power over the acting or mode of acting of the subordinate. He adds: "Where the element of personal control is found, then responsibility either for malfeasance or nonfeasance, for fault or negligence, will attach, not only to the servant or workman (he is always liable), but for him who had the personal control over him—who was his superior in the sense of the maxim."

In this case the plumbers were certainly under the control of McNichol, who employed them to do what work was required to provide sufficient heating for the store. And under such circumstances both the employer and the contractors should be held liable.

As to the damages to be recovered, the defendants contend that the amount claimed by the plaintiff is exorbitant, that the prices placed on the goods were higher than their real value, and that they were not damaged to the extent that she pretends.

There is some evidence that in the taking of stock by the plaintiff's sister and the men employed to assist her, the price of some of the goods was exaggerated; some of the goods were quoted at their invoice price, while they were out of season and depreciated in value. As to the sale at so much on the dollar, it seems to have been conducted in a fair and business-like manner.

Letters written by Mr. Howell's firm, the plaintiff's solicitors, to the defendants, or their solicitors, shew that the defendants were notified of the intended sale, that they were asked to suggest any different means of sale, if it was thought that the course taken was not likely to realize the largest price. It does not appear that anything was done or suggested by the defendants for disposing of the goods in a different manner.

The goods were placed in Pulford's auction room, and the auctioneer, after advertising several successive sales without getting a sufficient offer, and after refusing different offers, ranging from 10 to 15 and 17 cents on the dollar, succeeded in selling the whole stock, as shewn in the inventory, at 20 cents on the dollar.

In view of the fact that the defendants, although invited to do so, did not suggest any other mode of disposing of the goods, I think they must be held to have, impliedly at least, acquiesced in the sale, and I find that the sale was properly conducted, and was the best mode of disposing of the damaged goods; and that they were sold for the best price that, under the circumstances, could be obtained for them in their damaged condition.

There should be judgment for the plaintiff against all the defendants for the loss she has sustained by the damage caused to her goods and furniture injured by steam and water, during the night and morning of the 28th and 29th December, 1904, the amount of damage to be ascertained by reference to the Master; the plaintiff to have the costs of suit; the costs of the reference to be left for the further order of the Court.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. DECEMBER 27TH, 1905.

TRIAL.

KLUGMAN v. MITCHELL.

Contract—Work and Labour—Failure to Complete—Excuse—Employment of Person to Finish Work—Counterclaim——Damages for Bad Work.

Action for balance due under contract for carpenter work upon the building of a house. Counterclaim for moneys paid to complete work in excess of contract price, and for bad work.

J. D. Murphy, Oxbow, for plaintiff.

E. L. Elwood, Moosomin, for defendant.

WETMORE, J.:—Plaintiff agreed to do the carpentering work in building a house for the defendant for $270. He and his men did work down to 9th September. After they left the plasterers were put in. Defendant, after the plasterers left,

or about the time they left, notified plaintiff to come back and finish his work; he did not come. He states his reason for not coming back was because the plastering was damp, and the carpentering work could not be gone on with in consequence. If as a matter of fact the plastering had been damp, the evidence seems to point in the direction that it would not have been prudent to have gone on with the carpentering work on the inside of the building; but I find as a matter of fact that when plaintiff was notified to return and finish his work, there was work that he might have done upon the outside of the house, and have allowed the plaster to dry while he was doing it. I find further as a matter of fact that when he was notified to come and finish his work the plastering was not so damp as to prevent his doing the work. There were portions of the house at least where he might have done the work on the inside, the plastering being dry enough for that purpose; the finishing coat had all been put on at the time that he was requested to come back, and, that being on, the evidence satisfies me that the whole building would have been sufficiently dry within two days. In fact I have reached the conclusion that plaintiff's alleged reason for not coming back is a pretence, and I accept defendant's version, that he did not come back because it suited his convenience to attend to other work.

Defendant engaged other persons to complete the work, as, under the circumstances, he had the right to do, and not only had he a right to do it, but I think it was quite prudent for him to do it, in view of the fact that the season was far advanced and of the circumstances in which defendant was placed respecting his cattle.

Plaintiff did not complete his contract, and therefore he is not entitled to pay. Defendant, however, paid plaintiff $136 on account of the work done by him, and he paid Parr for finishing the work, $152. He has therefore paid altogether in respect to this work that plaintiff agreed to do $288, or $18 more than he contracted to pay. Defendant is entitled to recover this $18 from plaintiff on his counterclaim; he is also entitled to recover $7.50 for the price of paper furnished by reason of some bad workmanship of plaintiff in putting on the siding and ship lap. I find he is also entitled to recover damages for bad workmanship in respect to putting on this siding and ship lap and putting in the floor

imperfectly, and in consequence of the openings of the doors being out of plumb—I fix that at $15, which is little enough.

There will be judgment therefore for defendant on the claim, and judgment for defendant on the counterclaim for damages, $40.50. Defendant to have his costs in respect to both claim and counterclaim.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. DECEMBER 27TH, 1905.

TRIAL.

MUELLER v. CAMERON.

Bill of Sale—Actual and Continued Change of Possession—Rights of Execution Creditors—Rule 356—Consideration—Past Indebtedness — False Statement in Bill — Interpleader.

An interpleader proceeding to try the right of property as between the claimant and the execution creditors in some grain seized by the sheriff grown on the east half of section 34, township 5, range 3, west of the second meridian. The grain at the time of the seizure and the execution of the bill of sale mentioned below had been cut and was stooked on the land. At the return of the interpleader summons the claimant was barred as to the grain seized and grown on the south-east quarter of the section, and the claim as to the grain grown on the north-east quarter was heard in a summary manner.

J. D. Murphy, Oxbow, for judgment creditors.

B. B. Teed, Alameda, for claimant.

WETMORE, J.:—The facts of this case as presented by the claimant are of a most extraordinary character, and I must say that they at the least strike me as somewhat suspicious. According to her statement, she was the owner of the south-east quarter of the section in question, it having been her homestead about a year ago, and it must have been before

15th August, 1904, she sold this land to one Yates for $1,300. In August, 1903, she was employed by plaintiff, Mueller, who is the execution debtor in this matter, as his housekeeper, at $20 a month wages. At the time of this sale to Yates, no part of these wages had been paid to her. Mueller was indebted to a number of persons besides the claimant, and the proceeds of this sale of her homestead were handed over to be applied to the payment of Mueller's debts; no part was retained towards the payment of the large amount of indebtedness from Mueller to her, namely, a whole year's wages, and not a scratch of a pen was taken by way of security for this amount; she seems to have been contented with Mueller's verbal promise to repay her with interest. The next proceeding that appears is that on 15th August, 1904, Mueller and the claimant entered into an agreement with Yates for the re-sale to them of this very same land, which was to be paid for by delivery at the elevators at Alameda for Yates of the grain grown on such land. I merely mention these facts as they have impressed me as being very extraordinary; they are not material, however, in view of the conclusion I have reached, to the decision of the question now before me, namely, as to the grain grown on the north-east quarter of the section.

With respect to that question, I find the following facts. On 16th September last Mueller executed to the claimant a bill of sale of grain crops, straw crops, and goods and chattels, and among other things all the wheat, grain, crops, and straw grown on the north-east quarter of the section in question. The alleged consideration for this bill of sale was the indebtedness in respect of the proceeds of the sale of the homestead before mentioned, and the wages due from Mueller to the claimant down to the time of the execution of the bill of sale and interest thereon; the amount of these wages was for over 2 years, no part of them having been paid. This bill of sale was filed with the registration clerk of the Souris registration district on 22nd September. The execution at the suit of defendants upon which the sheriff seized the grain in question was lodged with the sheriff on 23rd December, 1904, and the sheriff seized it on 25th September, 1905. I find that there was no actual change of possession as between Mueller and the claimant with respect to the grain in question. All that the claimant did was to go over the land, look at the stooks, and, having found some of them blown down,

she gave instructions to Mueller to have them put up, and Mueller allowed her the privilege of taking his hired man to do so.

It is set up on behalf of the execution creditors that by virtue of Rule 356 of the Judicature Ordinance, the delivery of the execution to the sheriff on 23rd December bound this property, and that there was not such an actual and continued change of possession as to make the sale valid. This Rule is as follows: "Except as hereinafter mentioned, every writ of execution against goods and chattels shall, at and from the time of its delivery to the sheriff to be executed, bind all the goods and chattels or any interest in all the goods and chattels of the judgment debtor, within the judicial district of the said sheriff, and shall take priority to any chattel mortgage, bill of sale, or assignment for the benefit of all or any of the creditors of the judgment debtor, executed by him after the receipt by the sheriff of such writ of execution, or which, by virtue of the provisions of the Bills of Sales Ordinance, has not taken effect prior to such receipt as against the creditor's or creditors' interest under the execution, but shall not take priority to a bona fide sale by the judgment debtor, followed by an actual and continued change of possession of any of his goods and chattels, without actual notice to the purchaser that such writ is in the hands of the sheriff of the judicial district wherein the said judgment debtor resides or carries on business." In order to constitute an actual change of possession within the meaning of the Rule, there must be a change of possession of a character similar to that which is required under the Bills of Sales Ordinance. In Danford v. Danford, 8 A. R. 518, it was held that there must be in order to create a change of possession under the statute such a change as would be visible and apparent to the public. I think it is sufficient for me to say that not only is that not the case in this instance, but there was really no actual change of possession at all.

The consequence is that it is not necessary for me to decide whether the consideration alleged to have passed from Charette to Mueller as the foundation of the bill of sale, was fraudulent or not, because, assuming it to be valid, the bill

of sale was no good as against the execution creditors, by virtue of the Rule of the Judicature Ordinance above cited; that is—there being no actual change of possession—the priority of the execution over the bill of sale existed.

The consideration for the bill of sale, as expressed therein, is "the sum of $1,907.45 of lawful money of Canada paid by the bargainee to the said bargainor at or before the sealing and delivery of these presents." At already stated, the consideration was an alleged past indebtedness due from Mueller to the claimant. I am inclined to think, although I do not express a decided opinion on the subject, that the bill of sale is void under sec. 11 of the Bills of Sales Ordinance, because the consideration is not truly expressed; the express consideration is for a present payment, the true consideration was a past indebtedness.

During the hearing of this matter, I intimated that I thought that there was an English decision that where property had been sold by a person to an inmate of the same house with him, there need be no actual change of possession, because no change could be made under the circumstances. I have since discovered that the case I had in my mind was Ramsay v. Margrett, 63 L. J. Q. B. 513. That case, however, is not applicable, as the question turns upon the construction to be put upon the words "possession or apparent possession" in sec. 8 of the Bills of Sale Act, 1878, 41 & 42 Vict. ch. 31. It will be observed that the words of the Rule in question are "actual and continued change of possession."

There must therefore be judgment for the execution creditors, and there will be an order that the claimant be barred as to the grain seized by the sheriff grown on the north-east quarter of the section, as well as to that grown on the south-east quarter thereof; that the execution creditors pay the sheriff his costs of and incidental to the interpleader proceedings herein and possession money from the day of the service of the claim on the sheriff to this date; and that the claimant pay to the execution creditors their costs of such interpleader proceedings, including the costs and possession money so ordered to be paid by them to the sheriff. No action to be brought against the sheriff.

NORTH-WEST TERRITORIES.

(EASTERN ASSINIBOIA.)

WETMORE, J. DECEMBER 27TH, 1905.

TRIAL.

SCOTT v. BENJAMIN.

Principal and Agent—Agent's Commission on Sale of Land —Conflicting Evidence—Corroboration.

Action to recover commission on lands and machinery and personal property alleged to have been sold by plaintiff for defendant.

E. L. Elwood, Moosomin, and B. B. Teed, Alameda, for plaintiff.

J. D. Murphy, Oxbow, for defendant.

WETMORE, J.:—The evidence in this case is as contradictory as it can be. The evidence does not support the claim for commission on the machinery and personal property alleged to have been sold. As to the commission for selling the land; there is no doubt that the intention of the parties was that some compensation should be paid for plaintiff's services in respect to selling these lands. Plaintiff alleges that it was agreed that a commission of 5 per cent. should be paid him. Defendant, on the other hand, alleges that the compensation was to be entirely in his discretion, and that he was to pay plaintiff what he pleased, and that compensation was only to be paid provided the deal went through. In so far as the latter question is concerned, I apprehend that plaintiff's right of commission, according to his own testimony, would depend upon whether the deal went through or not; of course, if he did not bring about a sale, he would not be entitled to commission. There is no doubt that the sale in question of this land was brought about by plaintiff, and there is no doubt that the deal was closed. Defendant seemed to be under the impression that the deal would not be closed, although a binding bargain was made between him and the vendee, if for any reason that bargain was not carried out.

The land was sold to one MacLean, and defendant and MacLean entered into a written binding agreement by which defendant agreed to sell and MacLean agreed to buy the lands for a consideration, which was mentioned. The first payment provided for was paid down at the time of the execution of the agreement; the next instalment, however, was not paid promptly, and defendant cancelled the agreement, as apparently he had the right to do by virtue of one of the clauses contained in it, and he contends that the deal did not go through because he so cancelled this agreement. This is entirely erroneous—the deal was concluded when the minds of the parties to the contract came together; plaintiff in this action was by no means responsible for any forfeitures that occurred afterwards. If, however, the agreement was as defendant alleges, that the amount of compensation to be paid plaintiff was entirely in his (defendant's) discretion, it would seem under the authorities, Taylor v. Brewer, 1 M. & S. 290, and Roberts v. Smith, 28 L. J. Ex. 164, that plaintiff would not be entitled to recover. There is absolutely no corroborative testimony in respect to the material matter in question, but there is some corroborative testimony with respect to a matter somewhat collateral. Defendant alleged that a dispute arose between one Lawton and plaintiff by reason of plaintiff cutting Lawton out of a sale of these lands, as they had been listed with Lawton, and that this quarrel became somewhat accentuated, so much so that on one occasion defendant met plaintiff in rather a disconsolate mood in the street, and upon being asked by defendant what made him feel so, plaintiff stated that he had had a quarrel with Lawton over these lands, and he then went on to make some statement which affected his (plaintiff's) commission. Plaintiff on cross-examination denied that this took place, defendant asserted that it did, and he called Lawton for the purpose of shewing that there had been such a quarrel between him and plaintiff. Lawton, however, corroborated plaintiff, and stated that there never had been any quarrel between him and plaintiff on the subject. As stated, this is about the only point on which there was any corroborative testimony one way or the other. I have come to the conclusion and find that defendant did agree to pay the commission at 5 per cent.

There will therefore be judgment for plaintiff for $408 and costs.

BRITISH COLUMBIA.

(VICTORIA.)

MARTIN, J. DECEMBER 29TH, 1905.

TRIAL.

ESQUIMALT AND NANAIMO R. W. CO. v. McGREGOR.

Crown Lands—"Squatter"—Settler—Rights of—Railway Belt—Vancouver Island Settlers' Rights Act, 1904—Construction—Appropriation—Compensation—Powers of Provincial Legislature—Timber—Mines and Minerals.

Action for a declaration that defendant had no right, title, or interest in the coal or timber on certain lands, and for an injunction restraining defendant from working or tilling the same.

At the time of the union of British Columbia with Canada, one of the terms was the construction of the Canadian Pacific Railway to the coast. For this purpose what is known as the "railway belt" was reserved through the province, and extended to Vancouver Island, as the undertaking at that time was that the terminus of the railway should be at Victoria or Esquimalt, at the southern end of Vancouver Island. The tract reserved on the Island amounted to some 2,000,000 of acres.

Certain persons "squatted" on these Island lands, and from time to time made efforts by action at law and political pressure to obtain grants conveying mineral and other rights as well as the surface rights. Defendant was one of these squatters, and as such was entitled, under the terms of the agreement between the railway company and the government, to a grant of the surface rights at that time. The lands were very rich in coal and other minerals, but principally coal.

Eventually the Vancouver Island Settlers' Rights Act, 1904, was passed, and it was under that statute that defendant obtained his grant. This was a test case.

A. P. Luxton, K.C., for plaintiffs.

L. G. McPhillips, K.C., for defendant.

MARTIN, J.:—It must be determined first what the legal status of defendant was at the time he entered upon and

occupied the lands in question in 1879. This depends upon the fact of their being reserved, or not, from settlement at that time. By sec. 42 of the Land Act then in force, Rev. Laws B. C., 1871, ch. 144, it is enacted that "42. The Governor shall at any time, and for such purposes as he may deem advisable, reserve, by notice published in the Government Gazette, or in any newspaper of the Colony, any lands that may not have been either sold or legally pre-empted." And in pursuance of the powers thereby conferred a certain area on this Island, including said lands, was reserved, as set out by the orders in council cited; and that reserve, in my opinion, whatever its object, operated against the public generally, including those claiming rights under article 11 of the terms of union. The propriety of that valid executive act cannot be questioned here.

Such being the case, the defendant at the time of the passing of the Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province (1884), 47 Vict. ch. 14 (commonly called the "Settlement Act" because of the recital in its preamble that it was passed "for the purpose of settling all existing disputes and difficulties between the two Governments"), had no legal authority for his entry upon and occupation of Crown lands, and hence was merely what is commonly known in this Province as a "squatter" thereon; though "squatter" may be included in the term "settler:" Hoggan v. Esquimalt and Nanaimo R. W. Co., [1894] A. C. 429 at pp. 436-7. It is manifest that if the defendant is to be considered as being a squatter at that time, he can only save himself by relying upon the Vancouver Island Settlers' Rights Act, 1904. That is a statute of a very unusual kind, and it is a public and general one, and contains this exceptional section:—"4. The rights granted to the settler under this Act shall be asserted by and be defended at the expense of the Crown." This gives a significant indication that the legislature was aware that it was legislating in a manner quite out of the common, and in a matter wherein litigation was to be expected, and was prepared not only to confer unusual benefits but to support and assist the beneficiaries in their assertion of the rights conferred.

Reading the Act with the preamble and this section as a key to its true intent and meaning, and bearing in mind that, as this is a public and general statute, statements of fact therein contained must be accepted as being accurate (Attorney-General for British Columbia v. Ludgate, 8 B. C.

R. 242, 11 B. C. R. 258), I have no doubt, after a careful perusal of it, what one of its chief objects is, i.e., to recognize squatters as being entitled to special rights in the premises; to treat them in fact as if they had been in occupation of unreserved Crown lands pursuant to the Land Act. This view is specially supported by the first paragraph of the preamble referring to "certain persons . . . who have been unable to obtain titles in fee simple to the lands occupied by them," by the reference to certain "decisions of the Courts that the land was not open for settlement," and to the succeeding recital. There is, however, no doubt about the point, for the definition of the word "settler" in sec. 2 (b) is clear and far-reaching:—

"Unless the context otherwise requires:—" (b) 'Settler' shall mean a person who, prior to the passing of the said Act, occupied or improved lands situate within the said railway land belt, with the bona fide intention of living thereon."

This language includes the defendant, for I can see nothing in the context to warrant my excluding him, and he is therefore entitled to claim the benefit of the Act if he has conformed to the requirements of sec. 3, which he has done, and has consequently received a Crown grant in fee simple "in accordance with the provisions of the Land Act in force at the time said land was first so occupied or improved by said settler." It is clear to me at least, that the legislature passed this peculiar statute with the object of remedying some real or fancied hardships which had been brought to its attention in consequence of the litigation referred to, and that it intended to implement and put a new interpretation upon the Settlement Act, which should place certain early squatters as well as others in an assured position as against all the world.

It is admitted that the legislature in dealing with "property and civil rights in the Province" is paramount, because they come within its exclusive control by virtue of the B. N. A. Act, sec. 92 (13). The learned counsel for the plaintiff not unnaturally protested against the passage of legislation of this questionable class as being equivalent to confiscation of private property, but, as the Lord Chancellor recently said in Musselburgh Real Estate Co. v. Provost of Musselburgh, [1905] A. C. 491, at p. 497:—"Now, my Lords, it is said, and I think justly said, that it is contrary to the policy of Parliament to take away rights—to give anything

in the nature of property to others without giving compensation for it. But I think, on the other hand, it must be frankly admitted that where you are dealing with public necessities and public security, Parliament does sometimes do that. As it has been pointed out, it does it with respect to roads, and I think it does it with respect to harbours also."

Doubtless, it is quite true, as the same counsel submitted, that where two constructions are reasonably open, the Court will lean to that which will not work an injustice. But where the meaning is plain, as here, it is the duty of the Court so to construe it, and whatever may be the consequences of that result, they form part of the burden of responsibility which the legislature deliberately assumed when it passed the statute presumably in the public interest. In regard to this point of there being no compensation for this appropriation, I have not overlooked Mr. McPhillips's argument that lands in contiguous areas are to be made good to the Dominion in lieu of lands alienated, as provided by the 11th article of the terms of union, and by sec. 5 of the Settlement Act, and it is at least doubtful if such provisions have reference to the present case, because article 11 refers only to lands "which may be held under pre-emption right or by Crown grant," and the defendant did not originally so hold. And sec. 5 is limited to "lands equal in extent to those alienated up to the date of this Act," etc. It is not, however, strictly necessary to express a final opinion on this point, but I mention it to shew that I am not favourably impressed with the contention that plaintiffs will be able as a matter of legal right to obtain compensation for the lands they have been deprived of.

Such being my view of the matter, it is unnecessary to consider at length the question of the existence of the prior letters patent from the Crown in favour of plaintiffs under the Settlement Act, because, where the legislature with full knowledge there declared by a public and general enactment that others were entitled to antagonistic rights therein, the last word of the legislature on the subject must prevail. No authority, as might have been expected, could be found on the exact point, which differs radically from such cases as Victor v. Butler, 8 B. C. R. 100, 1 M. M. C. 438; Alcock v. Coote, 5 Best 340; or Great Eastern R. W. Co. v. Goldsmid, 9 App. Cas. 927; but to my mind it presents no practical difficulty. The peculiar result may, I think, also be regarded as somewhat akin to that in Colonial Secretary of

Natal v. Behrens, 58 L. J. P. C. 98, viz., there has been, without compensation, and by virtue of subsequent legislative authority, a lawful resumption of possession (here constructive) of lands alienated to a subject, upon which the right of that subject is pro tanto extinguished and reverts to the Crown: p. 100.

On the whole case, in the face of the Act, I cannot bring myself to say, as prayed, that the defendant has no right, title, or interest in the coal or timber on said lands, nor can I see how he can be enjoined from working or felling the same.

It follows that there is no other course, in my opinion, open to me than to dismiss the action with costs.

YUKON TERRITORY.

CRAIG, J. DECEMBER 11TH, 1905.

TRIAL.

CLAZY v. THORNBURN.

Mines and Minerals—Recorded Owner of Mining Claims—Mortgagee in Possession—Trespass—Justification under Lease Prior to Mortgage—Title of Mortgagor—Unlicensed Foreign Company — Sale under Power — Purchase by Agent of Mortgagee—Notice of Sale—Registration of Lease—Agency of Lessee's Husband.

Action by plaintiff, as the recorded owner of placer hillside mining claims 9, 10, and 11, Hunker Creek, alleging that by virtue of his grants he was entitled to the possession of that property; that defendant was carrying on mining operations as a trespasser and removing large quantities of gold-bearing gravel; that plaintiff had notified her to desist, and she had refused; and the prayer was for damages, for an account, an injunction restraining defendant from trespassing; and for possession of the property. The defendant denied the title of plaintiff and the right to possession. She admitted the carrying on of mining operations on the claims, but claimed a right to do so by virtue of a lease, or lay, or contract from

the former owners or mortgagors of the property, giving her the right for two years to carry on the mining operations; that that lease, lay, or contract was entered into some time before the giving of the mortgage under which plaintiff derived his title; that she entered into possession of the demised premises, and went into active occupation of the same and the working of the same as placer ground.

F. J. McDougall, for plaintiff.

R. L. Ashbaugh, for defendant.

CRAIG, J.:—Plaintiff derives his title under a mortgage dated 14th December, 1904, made by the Klondike Gold Placer Mines Company to plaintiff to secure $5,000 upon the claims in question and several other claims adjoining. The mortgage was to be payable on 15th June, 1905. The mortgagee has the power of sale, upon giving ten days' notice. The Klondike Gold Placer Mines Company appears to be a company incorporated under the laws of the State of Wyoming, in the United States of America. No copy of their charter of incorporation is produced; but the Canada Gazette of 20th June, No. 51, is produced containing a notice, under ch. 49 of 61 Vict., which is an Act permitting any joint stock company incorporated under the laws of a foreign country for the purpose of carrying on mining operations, to receive a license from the Secretary of State enabling them to carry on mining operations in the Yukon District and North-West Territories. The Act provides that the company requiring a license shall file in the office of the Secretary of State a certified copy of the charter or Act incorporating the company. Under this Act the company obtained the license mentioned in the notice published in the Gazette, which simply provides that they have a license to carry on mining operations in the Yukon and in the North-West Territories, with the privileges of a free miner, subject to the regulations affecting free miners, and pursuant to and in accordance with the provisions specified and contained in the said Act of Parliament. The company have not taken the benefit of the Canada Joint Stock Companies Act, 2 Edw. VII. ch. 15, which provides for their obtaining a charter under that Act. All the rights which they have are derived under 61 Vict. The mortgage is made by an attorney, who signs with his own seal, but not with the seal of the company, and executes it in the following form—"The Klon-

dike Gold Placer Mines Company by Duncan A. Cameron, attorney in fact." The power of attorney under which the mortgage purports to be executed is made by the company under its corporate seal, signed by its president, W. B. Cameron, and by A. B. Cameron, as secretary, and is a most peculiar power of attorney, in that it provides that the Klondike Gold Placer Mines Company, a corporation organized by the laws of the State of Wyoming, and licensed to carry on mining operations in the Yukon, appoints Duncan A. Cameron, of Dawson, "my true and lawful attorney for me and in my name and on my behalf and for my sole use and exclusive use and benefit to examine accounts, to indorse cheques and notes in which the company is interested, and particularly to negotiate for meeting a loan of $5,000, to make my note therefor, and to secure the more prompt payment of the note by mortgage or deed of trust upon all or any part of my real estate, lands, and hereditaments and mining property in the Yukon as to my said attorney shall seem reasonable."

Default was made, as appears by the evidence, in the payment of the mortgage, and on 6th July, 1905, the mortgagee sold by public auction to an agent of his own—Jacques Hess—who immediately transferred the property back to plaintiff. This sale was conducted for the benefit of plaintiff, the mortgagee, and the person buying was purely his agent to buy in for him. The notice of sale was given by letter written to Duncan A. Cameron, manager, and Cameron, it is proved, acknowledged the receipt of the notice; he has not signed as manager, although he acknowledges the receipt of the letter upon the letter itself, which calls him manager. There is no evidence whatever that Duncan A. Cameron is the manager of the company; the only manager so far proved to be such under the law is one Vifquain, who was appointed by virtue of the Act and under the notice published in the Gazette, and no change of manager or person authorized to receive process has been made.

The defendant claims under a document called a lay agreement between the Klondike Gold Placer Mines Company and the defendant. This document is not witnessed, but is proved, and is signed by W. B. Cameron, president, and by C. J. Vifquain, manager, not under the corporate seal, and it is not recorded in the Gold Commissioner's office.

Very many objections are taken by defendant in a very long and learned written argument, a great many of which I shall not consider for the purpose of determining this action. Counsel for defendant takes objection that there is no evidence to prove that this company who mortgaged had by their charter power to mortgage, or that the president was authorized by the board, if they had such powers, to mortgage; that the Canada Companies Act of 1902, 2 Edw. VII., does not apply to this company because they are not incorporated under it; that it is incumbent upon plaintiff, in proving his title, to prove the charter of the company, the powers of that company, and whether this mortgage was an execution of those powers; and that all that the license which the Klondike Company got, imports, is that they have a license to mine in the Yukon under that Act; that the mortgage is not under the seal of the company; that the power of attorney authorizing the execution of the mortgage does not authorize the execution of the mortgage on behalf of the company, but on behalf of the individual who signs it—Cameron—the words "me" and "my" being used throughout the power of attorney, and no other construction can be put upon it; that the lease to the defendant was granted before the mortgage; that the plainiff is not the owner, and that the sale, being made to himself, is colourable and abortive; that, if he is anything at all, he is simply a mortgagee in possession of the remaining portion of the lands covered by the mortgage, and if on these lands then entitled only to the rents after notice claiming such from defendant. Plaintiff answers that the objections to the title should have been raised on the pleadings, and that plaintiff has the benefit of the Companies Act; that, even if the lease is proved to have been prior to the mortgage, plaintiff had no notice of it, and that such notice should have been given by recording the lay agreement or lease under the mining regulations.

As to the evidence of title, plaintiff himself, by his evidence, raised all the questions which the defendant might have raised by his pleadings, because in proving his title he proved everything which I have recited, that is, the power of attorney to make the mortgage, the mortgage, the sale, the nature of the sale to an agent for plaintiff, and the notice in the Gazette of the license; also amending his statement of claim to claim as mortgagee in possession.

Another and a serious objection, it seems to me, is that the company mortgaging to the plaintiff have no license under the Consolidated Ordinances of the Yukon Territory, ch. 59, which requires that any company carrying on business in the Yukon Territory must obtain a license in this Territory, and sec. 8 of that Act provides that "no such company shall while unlicensed be capable of maintaining any action or proceeding in any court in respect of any contract made in whole or in part in the Territory, in the course of or in connection with business carried on without a license, contrary to the provisions of section 6 hereof." And sub-sec. 2:—"In any action or proceeding the burden of shewing that it is licensed shall be upon the company."

I shall not deal with the first objections of defendant, because upon two of the points raised I am with the defendant; first, that the company mortgaging should have had a license under the Ordinances of the Yukon Territory. It is no answer to say that they have a license under 61 Vict. That simply allows a foreign corporation to carry on mining business under the mining regulations which are under the jurisdiction entirely of the Federal authorities. It gives to the foreign corporation the status of a free miner in this country as far as the Federal Parliament can give them such status, but for the purpose of making contracts in the nature of this mortgage, which is a matter entirely under the jurisdiction of the local authorities, they having jurisdiction over property and civil rights, they must, to conform with that Act, obtain their license from the local authorities. They might go on mining under their federal charter as a free miner, but, when they endeavour to enforce any contract in this Territory, then they must have a license under ch. 59 of our Ordinances. Then, further, as to the particular rights of the defendant, it is clear that her agreement was made with the company (mortgagors to Clazy) prior to the date of the mortgage; that the president of the company, then in the country, as well as the manager appointed by statute—Vifquain—was aware that they had entered into occupation of the demised lands and into active operation upon them prior to the giving of the mortgage to Clazy. Clazy, I think, knew nothing about this until long after, but his manager, Sperling, could have known as early as March of this year. Large operations were being caried on in March, April, and May by open cut, quite plain and visible, and the shafts sunk and operations

carried on by Thornburn on behalf of his wife were also equally visible.

These properties are placer properties, and no other occupation can be expected than such occupation as is consistent with the working of the claims. There is no need for a man to reside upon the property who has a house adjoining, and the only occupant which one can consider or contemplate in a case such as this is the actual working of the same, digging up the placer ground, and washing it. This was done openly before the mortgage was given to Clazy.

I do not think the notice given to Cameron of the sale was sufficient notice. Notice should also have been given to defendant. She had a right to redeem if she was subject to the mortgage.

It is contended that the lay agreement, not being recorded in the Gold Commissioner's office, has no effect and is not notice; that only actual notice could affect or should affect the mortgagee, Clazy. It must be borne in mind that this was an agreement for two years, and, even if it is a lease, it does not require to be registered and need only be by parol and not by deed. If it is not a lease, then it is not a disposing of the property under sec. 38 of the mining regulations, which provides that "any free miner may sell, mortgage, or dispose of his or their claims, provided the instrument shewing such disposal be deposited with the mining recorder, who shall thereupon register the instrument in duplicate. That is the only section in the regulations providing for registration of documents affecting mining lands. It does not say that any instrument not registered shall be void, but my interpretation of it is, that it provides for a sale which shall pass through the books of the department, entitling the vendee to a certificate recognizing the sale upon the registration, but, as between the parties and the world generally, apart from the department of mines, that the sale is a perfectly good one without registration. Neither that section nor any part of the regulations pretends to void any document not registered under this section; it does not provide for notice by registration. And under the general law affecting leases, if this is a lease, then registration is not necessary so long as the lessee entered into actual occupation and public occupation of the demised premises.

It was suggested, and if it had been proven it would have been of great avail to plaintiff, that defendant was aware of

negotiations leading up to the mortgage. She was a stockholder in the company mortgaging, but no evidence connecting her with these negotiations was given nor connecting her husband, although possibly he had notice of them. His agency was admitted, but the extent of the agency was not clearly defined. I understood it to be that his agency was admitted so far as it affected the conducting of the lay agreement and the entering upon the property and carrying on workings on behalf of his wife, the defendant. The mortgagee or the plaintiff Clazy is not the owner under his mortgage because his sale to himself is clearly of no avail; see Bank of Australia v. Knight Hand in Hand, 4 App. Cas. 391; and Downes v. Grazebrook, 3 Merrivale 200, also found in 17 Revised Reports 62. But my judgment does not proceed so much upon that point as upon the ground that the company mortgaging to plaintiff should have had a license under our Ordinances, and that defendant is a tenant in possession prior to the mortgage, and the only remedy which the mortgagee could have against her is the right to demand the rents and receive the same from her.

The action will be dismissed with costs.

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MANITOBA.

PERDUE, J. DECEMBER 30TH, 1905.

CHAMBERS.

RE WESTERN CO-OPERATIVE CONSTRUCTION CO. AND BRODSKY.

Conviction—Motion to Quash—Recognizance—Necessity for Defendant Joining in—Company Defendant—Leave to Deposit Money in Lieu of Recognizance—Defective Condition—Costs.

The company had been convicted under the Masters and Servants Act for unlawfully refusing to pay wages to Brodsky.

A rule nisi for a writ of certiorari was granted by the full Court. On the return of the rule nisi certain objections were taken by counsel for Brodsky, and the application was sent to a Judge in Chambers to be disposed of. The motion then came before PERDUE, J., in Chambers.

G. A. Elliott, for the applicants, the company.

A. Dawson, for respondent, Brodsky.

PERDUE, J.:—A number of objections were taken to the proceedings upon which the application for the writ was based. It is only necessary to deal with those taken to the recognizance.

It was objected by the respondent that the applicant was not a party to the recognizance, and that there was no affidavit of justification by one of the two parties who entered into it.

The conviction was under the provisions of the Masters and Servants Act, R. S. M. 1902 ch. 108, and the proceedings for a certiorari in this matter are therefore governed by R. S. M. 1902 ch. 163, sec. 4. By that section "no summons or motion for a writ of certiorari in connection with a conviction or order made by a justice of the peace or police magistrate under a statute of this province, or summons or motion to quash any such conviction or order, shall be granted or entertained, unless the person applying for such summons, or on such motion, is shewn to have entered into a recognizance, with one or more sureties, before a justice of the peace, police magistrate, or County Court Judge, or to have made personally or by an agent, or attorney, a deposit with the convicting justice or justices, or one of them, or police magistrate."

The recognizance, as it is further provided by the above section, shall be to the satisfaction of the convicting magistrate, or of a Judge, and shall be conditioned that the applicant will prosecute the writ of certiorari or summons or motion, at his own cost, with effect, without delay, and will pay, if so ordered, the costs of the person in whose favour the conviction, order, or return is affirmed.

The recognizance filed in this matter was entered into by two persons, but the applicants are not a party to it. It was argued that as the applicants are a corporation they could not enter into and become a party to the recognizance. If this objection is well founded, then the applicants should have made the deposit provided by the above section. If a recognizance is furnished, the applicant must be a party to it by the express provisions of the section.

The further objection as to the omission to file an affidavit of justification by one of the parties to the recognizance was not fully established. The applicants allege that the affidavit was filed, but that it appears to have been mislaid. This need not be further dealt with, in view of the first objection, which is in itself fatal to the recognizance.

The recognizance was also defective in being conditioned for the due prosecution of "a writ of certiorari issued out of the Court of King's Bench for Manitoba," instead of a writ to be issued.

I will give the applicants leave to make the deposit with the convicting magistrate, as provided by the Act. This is to

be done within 14 days, and the motion may then be renewed. I would refer to Ex p. Tomlinson, 20 L. T. 324, and Regina v. Robinet, 16 P. R. 49.

The cost of the argument before me are to be costs to the respondent Brodsky in any event of the cause. If the deposit as above provided is not made within 14 days, the rule nisi is to be discharged with costs.

BRITISH COLUMBIA.

(VICTORIA.)

MARTIN, J. DECEMBER 2ND, 1905.

TRIAL.

REX v. HANNAY.

Criminal Law—Theft—Discharge of Accused at Preliminary Inquiry—Subsequent Committal by same Magistrates—Indictment—Validity—Depositions at First Inquiry not before Grand Jury.

Motion by the prisoner at the assizes to quash his indictment for theft.

W. Moresby, for the prisoner.

W. McKay, for the Crown.

MARTIN, J.:—On 17th June last the accused was brought before two justices of the peace on a charge of theft, and they, after holding the preliminary inquiry directed by secs. 577 et seq., discharged him, being, no doubt, "of the opinion that no sufficient case (was) made out to put the accused upon his trial." Subsequently, another information on the same charge was laid against him, and on the 22nd of the same month the same magistrates held the preliminary inquiry and committed him for trial. I have been at some pains to carefully examine the two sets of depositions in the custody of the clerk of assize, and find that on the second hearing the case made out against the accused was stronger

than on the first, because not only were additional witnesses examined, but the evidence of the former witnesses is more precise and definite in certain important respects not desirable now to specify.

It is objected that there is no jurisdiction in any magistrate to hear such a charge twice, and much more so in the case of the same magistrates who had before dismissed it, who at least on the ground of public policy should not have sat again, as such a course of contradictory procedure would, it is alleged, tend to shake the public confidence in the administration of justice. And it is further submitted that "in any event the indictment should be quashed because the depositions laid before the grand jury, and on which the indictment was founded, only included those taken at the second hearing, and not those taken at the first." In support of this motion reliance is placed on sec. 641 of the Criminal Code; Regina v. Lepine, 4 Can. Crim. Cas. 145; and Rex v. Traynor, ib. 410.

There is some misapprehension here, because the fact is that, apart from the depositions, the bill of indictment in question was preferred by the direction of the Attorney-General under sub-sec. 3 of sec. 641. And further, so far as I am aware, no depositions were, as a matter of fact, laid before the grand jury; the usual request for that to be done, where proper, was certainly not made, nor was there any apparent necessity therefor, because the witnesses were in attendance and went before the grand jury. It is not the practice in this province to lay the depositions before the grand jury as a matter of course, though if that body asks for them it is always done; I do not well see how such a request could in any case be refused, because the grand jury would be entitled to see, e.g., if the statement of a witness before them was consistent with one he had made below: see Regina v. Howes, 1 B. C. pt. II., p. 307; followed by me in Rex v. Hayes at the Victoria assizes, 3rd October, 1902 (unreported), after considering all the leading authorities. With great respect, I think the remarks on this point by Mr. Justice Wurtele in Rex v. Belanger, 6 Can. Crim. Cas. 295, are too broadly stated at p. 304; but perhaps, if they are to be taken literally and as only meaning that the Judge should not read the depositions to the grand jury, that may be another matter: I have never adopted such a course. But, assuming that the second set of depositions was laid before the grand

jury, there would be no object, if there was jurisdiction to take the second, in submitting the first to them. It is not urged that there were irregularities in the actual taking of either set.

The question then comes back to the jurisdiction of the magistrate at the second hearing.

A preliminary inquiry is, of course, as its names implies, not final in its nature: Re Guerin, 16 Cox C. C. 596, 601; and at common law a dismissal by magistrates is not tantamount to an acquittal upon indictment: Regina v. Waters, 12 Cox C. C. 390; though in certain cases it is made so by statute, e.g., in summary trials of indictable offences by magistrates: secs. 797, 799, as to which see Rex v. Cameron, 4 Can. Crim. Cas. 385, and Clarke v. Rutherford, 5 Can. Crim. Cas. 13. There is no doubt that a charge dismissed by one magistrate may be heard by another: Regina v. Morton, 19 C. P. at pp. 14, 22, 23, 26. At the last mentioned page Mr. Justice Gwynne says:—"It has never been contended that the discharge of a person accused of a felony committed within this province, when brought up before a justice of the peace for examination, whether such discharge should be attributable to the infirmity of the judgment of the justice, or the insufficiency of the evidence adduced before him, operates as a bar to the same person being again brought up before another justice and committed upon the same charge, upon the same or different evidence."

Now, while I think that it might be well, for the reasons suggested by counsel, wherever it could conveniently be done, that a second hearing of the same charge should be before a different magistrate, or magistrates, yet I am unable to hold that there is anything illegal in the other course being adopted. In the case at bar no injustice has been done, and the result has been to throw further light upon a matter which, in the public interest, ought to be investigated, and I cannot see that the accused has been in any way prejudiced.

It follows, then, that since all proceedings, both in this Court and below, have been regular, there is no ground for quashing the indictment, and the motion must be dismissed.

BRITISH COLUMBIA.

(NELSON.)

MARTIN, J. DECEMBER 9TH, 1905.

TRIAL.

WHEELDEN v. CRANSTON.

Mines and Minerals—Placer Mining Act—Validity of Location of Claim—Continuous Working—Building Cabin on Claim—Making Drain—Re-location—Notice of Abandonment—Change in Statute—Boundary Line—Common Post between Claims—Trespass—Damages—Injunction.

Action for damages for trespass to a mining location, and for an injunction to restrain the defendant from trespassing.

S. S. Taylor, K.C., for plaintiff.

A. M. Johnson, for defendant.

MARTIN, J.:—Several questions on the Placer Mining Act are raised herein, and I shall dispose of them in their order.

First, it is objected that the plaintiff has not "represented and bona fide worked . . . continuously, as nearly as practicable during working hours," the placer claim, "the Owl," in question, while he was engaged in building his cabin on the claim in which to live while working it. This point has already been answered in favour of the plaintiff by the judgment of this Court in Woodbury v. Hudnut, 1 M. M. C. 31, at p. 34, wherein it is laid down as follows:—

"It was said that the work to be done on a claim (which is to be worked continuously) must be miner-like work—that building a house is not miner-like work at all; and, moreover, that the house in question was not on the Kootenay Chief ground at all, though not far off. Now, of course, in Cornwall or Northumberland, building a house is not miner's work—it is not mining at all. In old and highly organized countries the landlord mines with hired labour, and puts up houses for his men. Yet the cost of those houses is just as much part of his mining capital invested in the mines,

and the houses are just as useful for working the mines, as pumps and furnaces with which the water is removed or the ore roasted. And among the hills of British Columbia the first thing a miner does (when he intends continuous working) is to secure, or to build if necessary, a cabin in a spot convenient as possible to his claim. It is not necessary that it should be actually on his ground. There may be overwhelming advantages in wood and water a quarter of a mile off. It is quite sufficient if it be in a place manifestly convenient for the workers. The building of a cabin on first settling down to the serious working of a mineral claim is therefore just as much miner's work in reference to the holding and working of the claim as is afterwards the sinking of a shaft or the driving of a tunnel, or building a pump."

That case was decided on the following sections of the Act of 1882:—48. Every free miner shall, during the continuance of his certificate, have the exclusive right of entry upon his own claim, for the miner-like working thereof, and the construction of a residence thereon, and shall be entitled exclusively to all the proceeds realized therefrom; provided, that his claim be duly registered, and faithfully and not colourably worked; but he shall have no surface rights therein. Provided also, that the Gold Commissioner may, upon application made to him, allow adjacent claimholders such right of entry thereon as may be absolutely necessary for the working of their claims, and upon such terms as may to him seem reasonable. 51. A claim shall be deemed to be abandoned and open to the occupation of any free miner when the same shall have remained unworked on working days by the registered holder thereof for the space of 72 hours, unless sickness or other reasonable cause be shewn. 52. Every full-sized claim or full interest as defined in this Act shall be represented and bona fide worked by the owner thereof, or by some person on his behalf.

Second, it is submitted that because the plaintiff had already located a claim covering the same ground, on the 1st December, he could not re-locate it subsequently (on the 3rd December), without complying with sec. 7 of the Placer Mining Act Amendment Act, 1901, i.e., in this case he should have posted formal notice of abandonment on the 4 corner posts of his claim, because it had not yet been recorded. What happened is peculiar. The plaintiff essayed to make a valid location of a "creek claim" under the repealed sec.

20 of the statute of 1897, which gave him a claim 100 feet square. What he did amounted to making a valid location under that Act, but when he came to record the location he found out from the mining recorder that the law had been changed, and that by the Act of 1901, then in force, he was entitled to a claim 250 feet square, which could only be obtained by conforming to the formalities of that statute, which differed from the former under which he had made his location. He thereupon decided to proceed no further with his abortive attempt under the former statute, and proceeded to locate under the existing one. In such circumstances, I am of the opinion that he did right in treating the result of his former misconceived efforts as a nullity, and consequently it was unnecessary to comply with sec. 7. There was no bar to his doing so, because no valid claim had been located by him on that creek, and therefore he was justified in beginning de novo to locate one.

Though it does not, in this view, strictly affect the question, yet I also point out that sec. 7 provides that after observance of its conditions the locator "shall thereupon be entitled to locate and record another placer claim upon other ground in lieu of the abandoned claim . . ." It would, I think, be found difficult to apply such language to the exceptional facts of this case, because it was the same ground that was re-located by the same locator.

Third, it is urged that the re-located claim is invalidated because in placing a necessary post on and about the centre of the common boundary line between the Owl and the Eagle claims, which line was exactly coterminous in each claim, one post was used to do duty for both claims. On one side of the post was written the name of the Owl claim, and on the other that of the Eagle. It is contended that the Act requires the erection of a complete and distinct set of posts for each claim, and that no post can perform a joint duty. Before adopting such a very technical construction, such an intention of the legislature must clearly appear, but I can find nothing in the Act which positively requires it. What was done was at once convenient and plain, and the notice on the post shewed the two claims it pertained to, so that the object of the Act in requiring due marking of the boundary had been accomplished.

Finally, the claim is sought to be invalidated on the ground that it was not continuously worked, or worked at

all, for many weeks while the owners were working on the rock cut (drain) on the Hawk claim, just below the Owl, on the same creek. It is clear from the evidence that it was necessary for the miner-like working of the Owl that a rock cut and drain should be constructed through the Hawk. That work was consequently undertaken by the Owl's owners on a grub stake agreement with the owner of the Hawk, and the plaintiff relies upon sec. 49 of the Placer Act, which provides that "A tunnel or drain shall be considered as part of the placer claim, or mine held as real estate, for which the same was constructed."

There was no necessity for plaintiff to resort to sec. 48, and obtain and record the license of the Gold Commissioner, for that section was passed to protect the rights of other owners and the Crown, while here plaintiff had obtained the leave and license of the party concerned. If a drain is to be considered as part of the placer claim, then the miner-like and necessary work done on it applies to and must be held to be a representation of the claim. There is nothing new in the idea that certain work done off a claim and in connection with it must be so regarded, because in Woodbury v. Hudnut, supra, the cabin was not built on the claim in question. The principle was sought to be distinguished because here the plaintiff was also working the Hawk under the agreement, as well as making the drain. But surely because the owners concerned took advantage of the occasion to work that part of the Hawk through which the rock cut and drain were constructed, and so save the gold therein, the plaintiff has not lost his statutory right to have such drain regarded as part of his claim? Of course, if I were satisfied that this was merely a colourable scheme to work the Hawk and let the Owl lie idle, that would be a very different matter.

It follows that the plaintiff's location, being a valid one, has been trespassed upon by defendant, and for that trespass damages must be awarded, but only nominal, i.e., $1, according to Woodbury v. Hudnut, as there is no evidence of special damage shewn; and there will be a perpetual injunction restraining future trespass, as prayed.

EXCHEQUER COURT OF CANADA.

(BRITISH COLUMBIA ADMIRALTY DISTRICT.)

MARTIN, LOC. J. DECEMBER 29TH, 1905.

TRIAL.

KENNEDY v. THE "SURREY."

Ship—Injury to Boom in River—Negligence—Right to Moor Boom along Bank of Navigable Water—Interference with Navigation—Nuisance—Use of Water in Reasonable Manner and for Reasonable Period—Action in Rem—Delay in Commencing—Change in Ownership of Vessel—Damages —Reference.

Action in rem to recover damages for injuries to a boom of shingle bolts owned by plaintiff, by reason of alleged negligence in the management and operation of the defendant ferry boat.

E. P. Davis, K.C., and W. M. Gray, for plaintiff.

Joseph Martin, K.C., and R. Cassidy, K.C., for defendant.

MARTIN, J.:—A question of general importance is raised in this action affecting the public right in navigable waters, and in particular the rights and obligations of persons using such waters for the booming and transportation of logs.

The steamship "Surrey," a double-ended ferry boat, owned and operated by the corporation of New Westminster, across the Fraser river to a wharf, bridge (or approach), and landing place, also owned, as is admitted in the statement of defence, par. 10, by the same corporation, made, in the early morning of Tuesday the 23rd June, 1903, her first trip that day to the wharf, and in making her landing, used for the first time a scow moored to the down stream (west) side of the approach or to the wharf, which scow had been put into position the evening before. Before that time, the landing had been made at a more convenient part of the wharf proper, much further into the stream and better situated for the purpose; but, owing to the flooded condition of the rapidly rising river, which was running with a very swift current of some 6 miles an hour, the wharf had become so

damaged and unsafe that the scow had to be brought to enable a landing to be effected. It was placed end on to the approach to the wharf, which approach, or as it was sometimes spoken of as a bridge or pier, was of planks set on mud sills, the wharf structure proper being on piles, as the witness Smith explains, beginning at the place marked "wharf" on the plan. It is admitted that this new landing place was closer to the bank than the old one, and the scow so placed projected its full length down stream and towards a boom of shingle bolts owned by plaintiff. The steamer that morning made her landing parallel to the shore, as described by the witness Smith, and lay end on end to the scow, so that vehicles were driven straight on board; the other end of the steamer pointed in the direction of the boom; I say "end" because properly speaking she has neither bow nor stern, both ends being constructed so as to be used alternately for either purpose; she was about 120 feet long. At that time the boom was not attached to the wharf, but was moored by two shore hawsers to two piles (B. and C.) on the bank above high water mark. At a distance of 315 feet down stream from the outer corner of the lower end of the scow was another pile (D.), standing in the stream some 70 feet from the shore line at ordinary high water. The current at the time was always down stream, the flood overcoming the flow of the tide. The boom was also fastened to pile D., and to another similar pile E., lower down and nearer the shore, and these 5 piles formed part of a set which were driven 18 years ago at that point for the purpose of making booms fast, and have been so used ever since. The corporation, as well as the officers of the steamer, were aware of the position of the boom, because when plaintiff began to make it up and fill it with shingle bolts, he applied to and got permission from the council to use the wharf for the purpose of unloading bolts therefrom, as set out in the city clerk's letter of 6th May, 1903. On 13th June he had filled his boom, and was waiting for the saw mill company to tow it away, but they did not do so as arranged, and, though I am satisfied that plaintiff made every reasonable effort to obtain a tug for that purpose, he was unable to do so, owing to the rapid rise of the water, which rendered it dangerous to attempt to take the boom through the draw of the Blue Island bridge down the river. On the 18th plaintiff received a notice from the city clerk, asking him to remove the ropes from the wharf.

owing to the danger from the increased strain caused by the swift current. On the following day he also received through his brother a letter from the chairman of the board of works, as follows:—"Mr. C. Kennedy: The city council wished me to see you if you would be kind enough to see your brother about the boom of shingle bolts that is made fast to ferry landing on south side of river. Some of the piles have gone out of place already, and the council is afraid that the extra strain of the boom with so strong a current running might do some damage to the wharf; he could make the boom fast to the boom piles along the shore. Please have your brother attend to this. Yours truly, W. A. Johnson."

On the next day, Saturday the 20th, he made the boom fast to the shore piles B. and C., but left the rope to the wharf still in position. Next day, Sunday, the captain of the steamer cut this wharf rope, after notifying plaintiff to that effect, and the boom dropped a little down stream and nearer towards the shore and into the position it occupied at the time of the accident. In my opinion, in the unusual and uncontrollable circumstances, the captain was justified in cutting the rope on the principle of preservation of property, in an emergency pointed out by Chancellor Boyd in Langstaff v. McRae, 22 O. R. 78, p. 86. The top point of the boom was then some 120 feet from the nearest point of the scow and some 20 feet nearer to the shore. The boom was between 360 and 400 feet long, narrow at the upper end, but at the lower, where the current carried most of the bolts, it widened out into something like the shape of a pear. At a point about 300 feet below the scow the boom was a little farther out in the stream than the scow.

A dispute arises as to what happened when the steamer left the scow to return across the river, and the fact that she was the cause of the boom breaking is denied, but I am satisfied beyond doubt, on the evidence of the disinterested witness, that she was, and that it happened by her backing into it, or the main hawser which held it. The question then arises, assuming that plaintiff was justified in leaving the boom in that position, was the steamer guilty of negligence in the premises? On a consideration of all the facts and circumstances, and having regard particularly to the flood in the river, the state of the current, the undermining of the wharf, the changing of the landing place, and the use of the scow for that purpose, thus bringing the steamer for the

first time much nearer the shore and boom, I can only come to the conclusion that she was not handled with that "ordinary care, caution, and maritime skill" which it is the duty of a prudent mariner to exercise. If he had not sufficient appliances to get his vessel away from the scow and out of that position without running the risk of injuring the boom, he should not have attempted it; it would admittedly have been a safe manœuvre if a line had been attached to the old piles called the Three Dolphins. But the captain's contention in the witness box was that a skilful mariner ought to have been able to get his vessel away without resorting to such a manœuvre, and without striking the boom, and he contends he did so. But the facts are against him, and I am afraid that he was more concerned in an effort to "make a schedule trip," as the witness Card calls it, than to lose time in taking the extra precautions that the dangerous state of the locality required.

And further, and in addition, there is much to be said in favour of the contention of plaintiff's counsel that, in the circumstances, it was the duty of the captain to have notified plaintiff of the danger, if such there were, of the boom interfering with the new landing. In its former position it had not proved to be any obstruction to the steamer, and even when the landing was changed and moved in closer to the alleged dangerous area, the captain seems to have been satisfied after he took matters into his own hands and cut the rope, and so allowed the boom to drop further down the stream as mentioned. It would have been a simple matter if he still thought the boom was too close, because of the scow and the new landing at a place not theretofore used for that purpose, to have notified the plaintiff and explained the situation to him, and at least given him the opportunity to move his boom still further down to meet the changed conditions. The truth is, in my opinion, that the captain was satisfied that there was no danger from the scow if the steamer were properly handled.

So far, it has been assumed that the boom was lawfully moored along the bank, but the defence is also raised that the plaintiff must be regarded as being a trespasser because he admittedly has not complied with sec. 2 of the "Act respecting Certain Works Constructed on or over Navigable Waters," R. S. C. ch. 92, sec. 2:—No bridge, boom, dam, or aboiteau shall be constructed so as to interfere with naviga-

tion, unless the site thereof has been approved by the Governor in council, and unless such bridge, boom, dam, or aboiteau is built and maintained in accordance with plans approved by the Governor in council."

There is unfortunately no definition of the word "boom" in the Act, but manifestly from the context it is for the purposes of the Act assumed to be a work of a more or less fixed or permanent nature, like the other class of works dealt with, and the words "constructed," "site," and "built and maintained in accordance with plans approved by the Governor in council," exemplify this. There are various kinds of booms in use in different parts of Canada, ranging from costly fixed or permanent structures of great strength and solidity, sometimes miles in length, used in connection with extensive lumbering operations, down to the small and temporary affair frequently made up by the settler in this province out of timber cut in clearing his land, and filled, e.g., as here, with shingle bolts, from some convenient point on the river bank preparatory to its being towed away like a raft by the purchasers thereof. In the many cases I have consulted I find some of these classes of booms mentioned. Thus in Brace v. Union Forwarding Co., 32 U. C. R. 43, there were government booms, a permanent toll boom of a boom company, and a "pocket boom;" in Queddy River Driving Boom Co. v. Davidson, 10 S. C. R. 222, and in Drake v. Sault Ste. Marie Pulp Co., 25 A. R. 251, the booms were of a more or less permanent and extensive nature; while in Crandell v. Mooney, 23 C. P. 212, and Langstaff v. McRae, 22 O. R. at p. 85, they were temporary, and in the latter case "side booms" are spoken of; the definition of boom in Murray's Dictionary, cited at p. 85, is manifestly not an exhaustive one. The expression "to boom a river" is a common and well understood term, and undoubtedly within the scope of the statute, but that is a very different thing from "making up a boom" of logs or bolts on the banks of so great, broad, and deep a river as is the Fraser at the place in question. What is or is not the reasonable use of a navigable river depends upon circumstances, and the river may be used in a great variety of ways. Timber, for instance, may be transported on it, in rafts, booms, scows, or vessels, and in the case of scows and ships they may be and are frequently loaded from the bank direct, especially in the case of shallow-draft, stern-wheel steamers. In this relation I draw attention to a lead-

ing authority on the point of navigable waters, Crandell v. Mooney, 23 C. P. 212, and particularly to this passage at p. 221, which Mr. Justice Galt says, p. 222, contains a full and reasonable exposition of the law:—"The general doctrine to be deduced from the authorities we have collated in reference to the use of navigable rivers, or public streams, as public highways, is, that each person has an equal right to their reasonable use. What constitutes reasonable use depends upon the circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use, with entire precision, so various are the subjects and occasions for it, and so diversified the relations of parties therein interested. In determining the question of reasonable use, regard must be had to the subject matter of the use, the occasion and manner of its application, its object, extent, necessity, and duration, and the established usage of the country. The size of the stream, also, the fall of water, its volume, velocity, and prospective rise or fall, are important elements to be taken into the account. The same promptness and efficiency would not be expected of the owner of logs thrown promiscuously into the stream, in respect to their management, as would be required of a shipmaster in navigating his ship. Every person has an undoubted right to use a public highway, whether upon the land or water, for all legitimate purposes of travel and transportation; and if, in so doing, while in the exercise of ordinary care, he necessarily and unavoidably impede or obstruct another temporarily, he does not thereby become a wrong-doer, his acts are not illegal, and he creates no nuisance for which an action can be maintained."

This extract was in answer to the contention of the plaintiff's counsel that "as the Fenelon was a navigable river and public highway, it was the absolute duty of the defendant not to obstruct it, or to do anything which in its consequences might prevent steamboats and other vessels from using it at all times." Mr. Justice Gwynne says, p. 224:—"All persons have an equal right to navigate this river with logs or steamboats, which right must be exercised, however, in such a manner as not unreasonably to impede or delay another in the exercise of his right."

The passage above cited has been approved in Rolston v. Red River Bridge Co., 1 Man. L. R. 235; affirmed in appeal 12th May, 1885. Cass. Digest Supreme Court (1893), p. 564;

Drake v. Sault Ste. Marie Pulp Co., 25 A. R. at p. 256; and in the latter case the point is succinctly put by Mr. Justice Osler, p. 257, wherein he says, "When the obstruction of the river by the logs ceased to be reasonable it ceased to be lawful." In any event the obstruction must be one to prejudicially affect the complainant, for, as stated in Langstaff v. McRae supra, by Chancellor Boyd:—"Quoad the plaintiff, it appears to me the defendants were not doing a wrongful act in stretching the boom, nor did any particle of damage arise to him from this act."

In Brace v. Union Forwarding Co., 32 U. C. R. 43, the plaintiff's boom blocked up the whole width of the stream, p. 53, and he did not open it wide enough to permit a steamer to pass, and therefore was held guilty of contributory negligence, but it was laid down that:—"The defendants would not be justified in destroying or injuring the boom, merely because it was in the river, if they could by reasonable care on their part have avoided doing so. In abating a nuisance of that description, a private person can interfere with it only to the extent to which it is an injury to him, and obstructing his passage: Dimes v. Petley, 15 Q. B. 276, 283."

As might be supposed, no attempt has been made by any Court, at least that I have been able to find after a careful search, to define the meaning of the term "interfere with navigation," which, as has been seen, depends upon so many and varied local circumstances. But several cases, in addition to those on booms already cited, have been decided, shewing what that expression includes. Thus it has been held on the facts to extend to crib work and piers in a navigable lake: Attorney-General v. Perry, 15 C. P. 329; piles driven in a navigable river: Brownlow v. Metropolitan Board of Works, 13 C. B. N. S. at p. 768; to piles driven in a public harbour: Wood v. Esson, 9 S. C. R. 239; to deposit of sawdust in a navigable river: Attorney-General v. Harrison, 12 Gr. 466, and Booth v. Ratte, 21 S. C. R. 637; to tailings from a quartz mill deposited in a public harbor: The Queen v. Fisher, 2 Ex. C. R. 365; to a bridge over a navigable river: The Queen v. Moss, 26 S. C. R. 322. On the other hand, for cases where it was held that there was no obstruction, see, inter alia, Rolston v. Red River Bridge Co. supra; London and Canadian Loan Co. v. Warin, 14 S. C. R. 232; and Regina v. Port Perry, &c., R. W. Co., 38 U. C. R. 431.

Where an interference is established, it is a public nuisance which any one specially damnified has a right to remove, and "nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance:" Wood v. Esson, supra, p. 243; Queddy River Driving Boom Co. v. Davidson, supra; and it is none the less so even if the "obstruction is of the slightest possible degree," and "of very great public benefit:" The Queen v. Moss, supra. And see Attorney-General v. Harrison, supra, p. 470, wherein it is also laid down, p. 472, that "no length of time will legitimize a public nuisance, the soil being in the Crown, and the user the common inheritance of the public at large." That the question of long and notorious user may, however, become an important factor in certain circumstances, is shewn by the cases of Langstaff v. McRae, supra, p. 85; and the Queen v. Moss, supra. Nor is a vessel which becomes helpless by accident strictly confined to the channel generally used in due course of navigation, and if she is forced to leave it, and, in taking the ground at a place which would have been safe but for an obstruction placed there, is thereby injured, an action will lie: Brownlow v. Board of Works, supra, p. 789.

It does not follow that all portions of a navigable water are used for purposes of navigation, and in rivers especially the nature of a particular locality may change: The Queen v. Moss, supra, p. 335; and see Attorney-General v. Harrison, supra, pp. 471-2; Gage v. Bates, 7 C. P. 116; and Ross v. Corporation of Portsmouth, 17 C. P. 195.

Applying all the foregoing principles to the circumstances of the case at bar, I am of the opinion that there has not been an interference with navigation by plaintiff in the true sense of that term. In so holding I do not wish it to be understood that any person has the right to continuously appropriate to himself any portion of the water or bank or shore of navigable water for the purpose of making up a boom of logs, but simply that he may, as hereinbefore set out, in a reasonable manner and for a reasonable period, having regard to local conditions, make use of such waters for that purpose.

So far, then, the defence has failed, but it is pleaded and argued that there have been such unreasonable laches and

delay by the plaintiff in enforcing his claim that in the meantime the present owners purchased the ship from the corporation of New Westminster in good faith and without notice, and that consequently this action in rem should not be entertained in this Court. The accident happened on 23rd June, 1903, the action was begun on 31st July, 1905, and the sale to the present owners was made on 20th February, 1905. The authorities on the point are collected in Abbott on Merchant Ships, 14th ed., 1901, at pp. 1039-42, et seq. Mr. Davis referred to In re Maddever, 27 Ch. D. 523, on the general question of mere delay in enforcing legal rights. There is nothing before me to shew what is an important element, viz., that the owners, in any way whatever, have been or will be prejudiced by this not very long delay, and it is not suggested that the corporation are not in a position to indemnify them against any claim plaintiff has against the ship; indeed, one of the witnesses for the defence, who had been employed by the corporation in keeping the wharf and approach in repair, stated the corporation was defending the action, though no counsel appears for them; and, while too much weight should not be attached to the statement, yet it is only what would be expected in the circumstances. Assuming it to be correct that in another Court the municipal corporation could not, owing to a statutory limitation, have been sued after the expiration of a year, I cannot agree that that of itself disentitles plaintiff to relief here. This defence also fails.

Judgment, therefore, will be entered in favour of plaintiff, and there will be a reference to the Registrar, assisted by one merchant, to assess damages.

I should add, since it was referred to by counsel, that the case of Wilson v. The "Coquitlam," decided by me on 4th April, 1902, affords no assistance in the determination of this action, because it was determined simply on the facts, and I had no difficulty in coming to the conclusion that there had been an interference with navigation by the boom of logs then in question.

YUKON TERRITORY.

CRAIG, J. DECEMBER 21ST, 1905.

CHAMBERS.

N. A. T. AND T. CO. v. SEATON.

Attachment of Debts—Exemption—Wages of Mariner—Master of Boat Plying on Inland Waters.

Motion by plaintiffs for an order for the payment out of money garnished, and paid into Court by the Dawson Electric Light and Power Company, the garnishees, being the wages or salary of the master of a steamboat plying on the Yukon river, one of the inland waters of Canada. The judgment debtor objected to the payment over, upon the ground that seamen's wages are exempt from attachment under sec. 80 of ch. 74, R. S. C., that section reading as follows: "No wages due or accruing to any seaman or apprentice belonging to any ship registered in any of the said provinces shall be subject to attachment from any court,' etc.

F. J. Stacpoole, for plaintiffs.

George Black, for defendant, judgment debtor.

CRAIG, J.:—The word "seaman" is defined in the interpretation clauses of R. S. C. ch. 74 as: "Every person except the masters, pilots, and apprentices duly indentured and registered, employed, or engaged in any capacity on board any ship." This Act relates to the shipping of seamen, and might be thought to apply only to those sailing upon the ocean, not to those sailing upon the inland waters, because a special Act, ch. 75, provides for the recovery of the wages of seamen on inland waters. In the interpretation clauses of the Act respecting seamen the expression "master" is also defined as including "every person except the pilot having command or charge of a ship." Both the Inland Waters Seamen's Act, ch. 75, and the Act respecting the shipping of seamen, ch. 74, provide that "the master of any ship, subject to the provisions of this Act, shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages and for the recovery of disbursements

properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as by this Act or by any law or custom any seaman not being a master has for the recovery of his wages." It is argued from that section that the master is in the same position in all respects with regard to his wages as the seamen. One must remember that until this Act was passed giving the master those rights, liens, and remedies, he was not in the same position as the seamen. He had not the right to maritime lien. While a master might insure his salary, a seaman could not. There were various other distinctions recognized in maritime law between the master and the seamen, and their rights in regard to their wages. Now the master has the right of maritime lien, as well as his personal right of action against the owners and employers. This amendment to the law is made by ch. 24 of 56 Vict., and it amends sec. 35 of ch. 75, R. S. C. That section is one of a number of sections, beginning at sec. 30, providing for the mode of recovering wages, and, I think, applies only to the recovery and to the rights which the master has to recover, giving him the same right by action, by maritime lien against the rem, and otherwise, as the seaman has. Nowhere is it cited to me, nor can I find, that the master is put in the same position as the seamen with regard to attachment, and the reason for this, I think, will be plain when one considers how the seaman has been regarded at all times. He has been regarded as under the special protection of the Court, and the Admiralty has always been jealous and vigilant and parental in respect to dealing with the wages of mariners. In the case of the "Thetis," reported in 1 Stewart 365, it is said that "seamen are regarded as essentially under tutelage; no such regard was had for the master of the ship, and it is the law yet that the seamen's wages take priority over his." As to the master's position with respect to his remedies for his wages, see Kay on Shipmasters and Seamen, p. 35. I can find no direct authority, but there is one case very much in point, I think, in establishing a basic principle; that is, the case of "The Salacia," 32 L. J. Adm. 41. That was a case in which the master claimed that he was entitled to be paid ratably with the seamen. The seamen resisted that claim, and Doctor Lushington in his judgment says: "The first question to be decided is, . . the claim of the master to be paid ratably with the mariners. There are two grounds on which

this claim is made to rest. The first is the 191st section of the Merchants Shipping Act. By virtue of the statute the master is put upon the same footing as the mariners with regard to the recovery of wages, but I think that this advantage so conferred upon masters was intended to relate to their claims against the owners and the owners of the property, but that the statutory enactment does not alter the relation of the master to the seamen. It is an established rule, so ancient that I know not the origin thereof, that the seamen may recover their wages by action against their master, and, that being so, it would, I think, be unjust to allow the master to take from a fund against which the seamen have a lien, to their detriment." It seems to me that Doctor Lushington would have decided this case differently if he had held that in regard to wages in every respect the master became a seaman and that all men employed on board ship—masters, seamen, and apprentices—stood upon the same footing and level with regard to the ship and their wages and the recovery of them. If a master was a seaman in the broad sense, then he would have been entitled to share ratably with the seamen on the sale of the rem, but here the clear distinction is drawn, and I think the principle is clearly established, that he is a seaman or stands in the position of a seaman only as to the mode of his recovery and his rights to recover from the owner and the owner's property, but that the old relationship as between him and the seamen is not affected, and that any further rights or privileges or exemptions such as the exemption from attachment are not created by the amendment, and I think therefore that his wages are not exempt from attachment under the Act.

There will be so costs.

YUKON TERRITORY.

CRAIG, J. DECEMBER 21ST, 1905.

TRIAL.

PALMER v. CHRISTIE.

Warehousemen—Storage of Goods—Advances—Failure to Repay—Sale of Goods—Purchase by Warehousemen—Assent — Acquiescence — Price Obtained — Interest — Storage Charges.

Action to recover the balance due to plaintiffs for moneys

advanced to defendant, for storage of oats, for interest, and other charges.

F. J. McDougal, for plaintiffs.

F. J. Stacpoole, for defendant.

CRAIG, J.:—Plaintiffs are merchants carrying on a large business in Dawson in groceries and in the class of goods mentioned in the statement of claim, namely, oats, besides being storehousemen or warehousemen; they are also miners.

Defendant in the autumn of 1900 brought into the Yukon Territory a large quantity of oats. Arriving at Dawson entirely without money or means even to pay the freight upon his shipment of oats, he applied to plaintiffs to finance him, as he called it, to store his oats, and cart them from the docks. Plaintiffs informed him that they would charge a certain rate for storage, and, after some negotiations with other persons, he returned, and an agreement was made by which plaintiffs were to finance the transaction for defendant, that is, provide him with sufficient money to relieve his oats from freight charges, which were enormous, to store his oats and cart them, the agreement being that they should receive $2.50 a ton for storage and financing and $1.50 a ton for cartage. Upon this agreement being arrived at, plaintiffs went to the Bank of British North America with defendant, who made his promissory note dated 13th October, 1900, for $10,964.31, payable on demand. The note was indorsed by plaintiffs, and the proceeds of the note used and chequed out to pay various charges against the charge—the White Pass and Yukon Railway, $7,299.35, and the Klondike Corporation, Limited, $3,364.96, and other charges. The note is a demand note, and bears interest at 24 per cent. per annum until paid. Upon the completion of this transaction of the note, the oats were carted to the warehouse of plaintiffs. None of the oats were sold until March, 1901, some small quantities being sold in March and April of that year, only a very trifling amount. It is in evidence that in April, 1901, a good price, called by some of the witnesses a "big" price, was offered, but refused by the bank and Christie, the oats still remaining in the storehouse of plaintiffs. During all this time interest was running on the note, to the full knowledge of defendant. Everything which was done was done with his knowledge. He went out of the country, and returned again in June, 1901, the idea being, as is clearly

shewn from the evidence, that defendant wished to hold on to the stock in expectation of a very large rise in oats, which rise never came, and he was never able to meet his liabilities. Although pressed to take the matter over and relieve plaintiffs, he took no step whatever in the matter. He simply hung around, hoping for some good fortune to come his way, which would raise the price and take him out of his difficulty. In December, 1900, it appears from the evidence, plaintiffs made a demand on him, but at that time plaintiffs were not the holders of the note. The note was still in the Bank of British North America, still bearing interest. The note was paid by plaintiffs on 13th August, 1901. Before this and on 31st July plaintiffs sold to themselves 667 sacks of oats or 62,558 pounds at 6¼ cents, and, as I said before, retired the note on 13th August. On 13th November plaintiffs sold to themselves the balance of the oats, being 541 sacks, or 48,984 pounds, at the same price of 6¼ cents.

Defendant contends that plaintiffs had no authority whatever to so deal with the oats, and that, if they did so deal with them, they should have paid him the highest going market price at the time, and that, being his agents, they should give him all the profit derived from the sale of these oats.

I think that plaintiffs were his agents in the sense of having his authority to do what they liked with the oats, and furthermore I believe from the evidence of the Palmer Brothers, and from the whole conduct of defendant, that they had his full authority to buy the oats themselves. When being pressed at the time he left this country in June, 1901, to settle this matter, he told them to realize and to pay themselves. His whole attitude was one of absolute indifference. He had no money to meet the note in the bank. He knew the interest was running on. He recognized that interest, and allowed plaintiffs to apply small sales upon the note, and while the note was lying in the hands of the bank certain payments were made upon it. I think that plaintiffs were the agents of defendant up to the time when they bought over the oats, and they bought them over with his full knowledge and consent. The only question is as to the price. There seems to be very little doubt, from the evidence of all the witnesses, that the price obtained in July was the fair market price for the oats, the only question being as to the price obtained in November. Plaintiffs say that they could have delivered

the oats to themselves, bringing them from the outside by steamer and landing them in Dawson at the close of navigation, for 5¾ cents, and that they did not do that because they knew they had these oats on hand which they could buy. That is the only evidence as to the price of oats delivered in Dawson by water that autumn, and if plaintiffs had sold to themselves at the close of navigation, and that were the only evidence upon that point before me, I should have to hold that a fair price was obtained, but they did not do that. They waited until 13th November, and I do not think they can be heard now to say that they must only pay the price going on 1st October or the end of September in wholesale lots. It is hard to come to an exact determination upon what the real price of oats in such wholesale lots was on 13th November. The lowest price given was 6½ cents, and they went as high as 9 cents. In October oats were selling at 7 and 8 cents in ton lots. I do not think 6¼ was quite enough to allow at that time, but I think 6½ would have been a fair price in these quantities. I am satisfied that the agreement was made, as plaintiffs say it was, for $2.50 for storage and financing and $1.50 for cartage. The plaintiffs voluntarily reduced the storage charges, and they will be bound by that reduction. They will also have to allow interest on sums received for the sale of oats at the same rate as they are charging, and they will also have to allow for broken months in the storage; that is, they apparently have not deducted the cost of storage upon oats sold during the month until the end of the month.

As for the question of interest, if plaintiffs had been the holders of this note when they made the demand in December, 1900, they of course could only charge interest at the rate of 5 per cent.; but they were not the holders until 13th August, at which time the bank handed over to them the note, the warehouse receipt, insurance policies, etc., and gave them possession of the note. At that time they had sold to themselves the bulk of the oats. During all the time the note was lying in the bank plaintiffs were the agents of Christie, who had voluntarily agreed to pay 24 per cent. until the note was paid. This Court has already held in the case of Benallack v. Bank of British North America that payments of interest voluntarily made to the bank in excess of the legal rate of 7 per cent. allowed by the Banking Act, are not recoverable back by the payer, and in this case I find that plaintiffs

voluntarily paid to the bank the excessive rate of interest which the bank charged in the transaction, and with the consent of Christie, the defendant, in that transaction. There is no evidence of any demand of any kind until December, and that was only a demand by Palmer Brothers, the indorsers, urging Christie to close up the transaction, they evidently being pressed by the bank in the same direction. Now Christie was aware that the note was running in the bank, and that the bank were charging a higher rate of interest than the legal rate, and that that rate was being paid. He was satisfied to allow the transaction to run on in that way, hoping for a larger profit. He allowed his then agents, plaintiffs, to pay that increased interest; they were paying it for him, and, I hold, with his entire assent and concurrence. They were not themselves in the position of holders of the note. I think that Christie is bound to pay the interest which his agents paid to the bank and which he recognized, and that plaintiffs are not compelled to take interest at the rate of 5 per cent. only from the demand made in December. If they then had been the holders of course they would be so compelled. They will only be entitled to interest at 5 per cent. from 13th August, 1901, when they paid the note. I think I have covered the other points in my judgment.

All the equities in this case are with plaintiffs. They received no more than a fair remuneration, as the evidence shews, for what they did for defendant, and never expected to assume any liability such as they were called upon to assume, or any burdens such as defendant threw upon them in looking after his interests. He entirely neglected his own interests, reposed everything in plaintiffs, letting them do as they liked, and now seeks to get out of a transaction which was entirely his own, in which he was to gain everything and lose nothing, but which the tide of circumstances threw against him.

I do not think any accounting will be necessary in this case to ascertain the exact amount due, but if one is asked for it will be allowed, to be computed upon the basis I have fixed.

The plaintiffs will be entitled to the costs of suit.

YUKON TERRITORY.

CRAIG, J. DECEMBER 28TH, 1905.

CHAMBERS.

FEY v. SEIMER.

Summary Judgment—Conditional Leave to Defend—Claim on Contract—Mining Coal—Lien—Counterclaim—Writ of Attachment—Setting aside—Absence of Fraud.

Motion by plaintiffs to strike out defendants' appearance and for summary judgment for the amount of plaintiffs' claim; and motion by defendants to set aside a writ of attachment issued by plaintiffs.

A. Noel, for plaintiffs.

H. S. Tobin, for defendants.

CRAIG, J.:—Plaintiffs are suing on a contract made on 27th June, 1905, with defendants, who are the owners of a coal mine known as the "Sourdough Mine" on Coal Creek, the contract being for the taking out of coal from the mines of defendants and delivering the same in the bunkers, the price per ton for the coal so delivered being $2.75, "to be paid with the first money received from sale of coal. On the defendants' failure to pay, the plaintiffs have the right under the agreement to sell enough of coal to satisfy the above-named sum, either in Dawson or at the mine." Under this contract plaintiffs took out a quantity of coal, and about the quantity there is a dispute; but it is admitted by defendants that they took out at least 1,298 tons. Plaintiffs claim a great deal more. The coal was evidently intended to be sold by defendants, but, singularly enough, no arrangements were made for this sale or how it was to be conducted, or the disposal of the funds as the coal was sold. Defendants took upon themselves to employ one Williams, the owner of a steamboat, to convey the coal to Dawson, without any express leave of plaintiffs, but apparently with their full knowledge, and without any very serious protest on their part except that they notified Williams that they had a lien on the coal for their work at $2.75 per ton, and that they expected in any event that their claim would be the first satisfied out of the

coal, even ahead of the freighting charges. When the coal was loaded upon the boats, apparently no shipping bills were taken, no receipts taken from the steamer, so far as I can learn from the affidavits or statements of counsel, nor any acknowledgment of the quantity. It was taken to Dawson and there deposited on the banks of the river near the Dawson Electric Light and Power Company building, in which Williams has some interest.

It is alleged in the affidavits that one D. A. Grant became surety for the freight to Williams on behalf of the defendants; that the coal was handed over to one Sidney Smith to sell. It is quite clear that Sidney Smith has been selling some of it, but since the coal came to Dawson none of the proceeds has been paid over to plaintiffs.

After the coal had been taken away, defendants gave to plaintiffs a paper to this effect: "This is to certify that Fey and Schaefer have mined the coal satisfactorily and have returned machinery, tools, and mine in good condition." And on the same day they gave to plaintiffs an order on Sidney Smith as follows: "Please pay to the order of Fred. Fey and Jacob Schaefer the sum of $3,571.23 for coal mined out of the first money received after freight is paid, and oblige." And again, another order: "Please pay to Fred. Fey what money you have on hand for labour done at mine." Defendants do not deny that these orders were given, but they say they were given in a hurry and in mistake, relying upon the representations of plaintiffs, and they find now, in measuring up the coal at the bunkers, that it does not measure up equal to the measurements made in the cars; that owing to bad loading of cars there is a shortage in the coal mined which has to be accounted for; that the real place of measurement is in the bunkers.

Williams claims a lien on the coal for his freight charges. Plaintiffs have filed a lien notice under the Mechanics' Lien Act, in which notice they admit or state that the period of credit has not yet expired. Defendants assert a counterclaim, but their main defence is that the period of credit did not expire; that not sufficient coal has been sold to satisfy plaintiffs' claim, and no first moneys are yet available because the first moneys should be applied in payment of freight, which was a necessary charge to enable the coal to be marketed at all to be of any benefit to anybody; that plaintiffs fully realized and understood that the coal had to

be carried by some one to Dawson, the only available market, before any money could be realized upon it. But the agreement provides for sale either in Dawson or at the mine; so that it appears the coal might have been sold at the mine.

First, with regard to the defence that the period of credit has not expired, there is evidence given, and it is not denied, that a large quantity of coal has disappeared in some way between the point of shipment at the mine and the place where it now rests in Dawson. This coal has been measured up, and while the quantity of coal which has disappeared cannot be arrived at with any absolute certainty, yet in the neighbourhood of 200 tons has disappeared, quite sufficient coal to satisfy all the freight charges and leave a very respectable margin for plaintiffs, or quite enough, if their claim be just that they are entitled to be paid before the freight charges, to pay their claim in full, or very nearly.

Now, defendants when shipping the coal did so entirely on their own motion. It is true that plaintiffs stood by, but there is no written consent, no release of their positive lien under the agreement. Defendants took upon themselves to employ the freighter and to make all the arrangements. They did not take the ordinary, simple precautions which they should have taken, of having a bill of lading or any receipt whatever from the shipper, and now we are in the extraordinary position of it being impossible to shew accurately what coal did go on board ship except by measuring what is left in the bunkers, and upon that point there is a direct conflict between plaintiffs and defendants as to the quantity the bunkers contained, something like 142 tons being in dispute. I think, therefore, that defendants have by their own conduct and by the disposal of the coal in the manner in which they did dispose of it, rendered themselves liable to pay now to plaintiffs. Enough coal had been sold to satisfy the claim or at least a part of it, and the first moneys received should have been so applied. They have not been so applied, and the failure to so apply them has been by reason of defendants' conduct. I therefore think there should be judgment for plaintiffs. As to the amount, the defendants raise a counterclaim which is sworn to and which I must give weight to. But even upon their own shewing, allowing them the full amount of their counterclaim, there is still a balance admittedly of $2,460.68. There is one item in the account of fares on railway and steamer for $96, which defendants allege they have paid to

Williams for passages for the men of plaintiffs, but plaintiffs deny any authority and defendants shew no authority to pay that sum. I will therefore in the meantime add that amount to the amount of the judgment, leaving it open to defendants on the trial to shew any authority they can for the payment of that sum.

If defendants pay into Court within 3 days the sum of $2,556.68, they may be allowed to defend for the whole, but unless they pay in that sum within the time specified there will be judgment for plaintiffs for the sum named, being part of the amount claimed, and the parties will proceed to trial as to the balance.

The costs of this motion will be costs in the cause.

In this same action the plaintiffs ex parte issued a writ of attachment and seized the coal in question, and a motion by defendants to set aside that writ was argued with the motion to strike out the appearance, the affidavits being so intermixed in the two motions that I could not clearly distinguish which affidavits referred to which motion.

Defendants move to set aside the writ on the ground that there was no debt due at the time of the issue of the writ and that no fraud is shewn.

In my judgment on the motion to set aside the appearance, I gave my views as to the debt being due. I think the amount was ascertained by the signature of the parties, the only question being as to the due date, defendants contending that not sufficient coal had been sold under the agreement to pay plaintiffs' claim for labour. In this motion, of course, the element of doubt as to the due date is more important than in the other, although not very much. I came to the conclusion that defendants by their own act had accelerated the date, if it was postponed by the agreement, and that enough coal had been disposed of either by them or by some one who was enabled to dispose of it by reason of their acts, to render the debt due. I therefore think that the debt was due, or there is sufficient doubt in the case if that were the only point, to maintain the writ. However, I do not think that plaintiffs have shewn that defendants were disposing of the coal with intent to defraud. That may or may not be so.

Plaintiffs have also taken another step in this matter by filing a lien under the Mechanics' Lien Act. The goods are in the possession of a person claiming to be entitled to them

as a freighter. On the ground that they have taken another remedy by mechanics' lien, on the ground that they have not convinced me of fraud on the part of the defendants, and the goods being in the possession of a person so claiming them, I think the writ should not be maintained. I must say, however, that I have some doubts about this matter. The mysterious disappearance of a large quantity of coal is hard to understand. Mr. Williams, the freighter, has not seen fit to give any aid to the Court by making any affidavit as to the quantity of coal on hand or the disposal which he has made of it, if any, and I must say that I am suspicious in the matter. However, if the trial Judge should find any collusion between defendants and Williams, or any attempt on the part of defendants to surreptitiously dispose of coal so as to defeat plaintiffs' claim, then the issue of the writ would have been justified, and upon any finding of his in that matter the costs of the issue of the writ and of this motion will depend. But, as plaintiffs will have security or a judgment under my judgment, and have also taken their mechanics' lien proceedings, I do not see any good in maintaining the writ in the view which I take of the facts, and the writ will therefore be set aside, costs to be dependent on the ruling of the trial Judge as to any fraud in the manner.

MANITOBA.

MATHERS, J. JANUARY 9TH, 1906.

CHAMBERS.

NIXON v. BETSWORTH.

Costs—Mechanic's Lien—Tender—Payment into Court—Taxing Officer—Practice.

The defendant Amey, by his statement of defence, admitted owing the plaintiff $37.95, but alleged a tender of that sum before the mechanic's lien, the subject of the action, was filed, and with his defence he paid into Court the amount admitted.

The plaintiff, in alleged pursuance of Rule 532, took this money out of Court, and he then applied and had his costs taxed by one of the taxing officers, pursuant to Rule 534.

Subsequently the defendant Amey brought in a bill of his costs of the action against the plaintiff, which the senior taxing officer taxed at the sum of $20.70, and gave his certificate thereof, dated the 22nd day of December, 1905.

The present motion was, inter alia, by way of appeal from the certificate.

A. E. Hoskin, for plaintiff.

Hugh Phillipps, for defendant.

MATHERS, J.:—Several grounds of appeal are taken, but the only one I find it necessary to consider is that the taxing officer should not have taxed such costs until the question of tender had been tried and determined.

Mr. Walker informs me that in taxing costs to the defendant he acted on the assumption that the plaintiff, by taking the money out of Court, admitted the plea of tender, whereby the defendant became entitled to his costs.

With deference to the learned taxing officer, I do not agree with him that the acceptance of the money had that effect.

While the defence of tender remains undisposed of it is quite clear, I think, that neither the plaintiff nor the defendant has any right to have his costs taxed against the other.

This matter has been dealt with in two cases.

In Griffiths v. School District of Ystradyfogwg, 24 Q. B. D. 307, the plaintiff accepted money paid into Court with a plea of tender. He then applied to tax his costs, but the taxing master refused on the ground that there was the issue of tender still undisposed of. An application to Field, J., for an order directing the taxation of these costs was dismissed and an appeal to the Divisional Court was also dismissed. Willis, J., said, during the argument, and his reasons were adopted by the Court: "If the plea of tender is made out the action ought never to have been brought, and the defendant is entitled to his costs, and in order to get them he is obliged to go to trial and have the issue tried which is raised by the plea of tender."

The other case is American Aristotype Co. v. Eakins, 7 O. L. R. 127, 3 O. W. R. 256. There the defendant paid into Court a sum of money, and at the same time pleaded tender before action. The plaintiff applied to the Master in Chambers to be permitted to take out the money so paid in, but the Master

refused the application, because of the plea of tender, and an appeal to Boyd, C., was dismissed.

The appeal must be allowed and the certificate of taxation appealed from, set aside.

I am informed by Mr. Walker that whilst it was objected before him that the defendant was not entitled to tax any costs, the point was not argued, nor were any authorities cited.

Under the circumstances, I allow no costs, as the result would probably have been different and this application saved had the matter been argued before the taxing officer.

MANITOBA.

DUBUC, C.J. JANUARY 12TH, 1906.

TRIAL.

PHILLION v. DOUGLAS.

Trust—Action to Establish—Joint Purchase of Land—Quit Claim Deed—Consideration—Account of Profits—Evidence—Onus.

Plaintiff and defendant became joint owners of a farm. The land had been purchased from W. J. Burrows for $1,050, payable in 7 annual payments of $150, the first of which was made on 12th February, 1903. On that first payment plaintiff contributed $50 and defendant $100. When the second payment became due plaintiff could not pay his share. A loan was suggested to pay off the whole purchase price, and was put through. The plaintiff stated that, by arrangement between himself and the defendant, he was to transfer his half interest in the land to the defendant, so that the loan might be applied for in the defendant's name. He executed in favour of defendant a quit claim deed, dated 18th March, 1904. The loan was obtained, applications were made for insurance on the buildings, and to bring the property under the Real Property Act, all in the defendant's name. The plaintiff alleged that the defendant was a trustee for him of an undivided half interest in the property, and brought this action to compel the defendant to account to him for the moneys realized from the sale of the land.

According to the defendant's version of the transaction, there was a complete settlement of the matter between the plaintiff and himself; the purchase price of the plaintiff's interest was taken into account in the settlement; the balance in favour of the plaintiff was paid over to him; and the quit claim deed was a straight conveyance of the plaintiff's whole interest in the land.

A. B. Hudson, for plaintiff.

D. A. Macdonald and C. Isbister, for defendant.

DUBUC, C.J.:—The evidence is conflicting and particularly contradictory as to the payment by the defendant to the plaintiff of the amount coming to him for his half interest. The farm was rented during the season of 1903, and the rent obtained was $70. The defendant states that the plaintiff received $35 as his share of the rent, and that he paid to him in cash the sum of $65, and that this was the consideration for the conveyance to him of the plaintiff's interest. Plaintiff denied that payment of $65, and said he never received a cent from defendant. If the quit claim deed was given by the plaintiff for the purpose of the loan only, and if it was agreed between them that the plaintiff was to remain owner of his half interest, that certainly constituted a resulting trust in his favour, and he is entitled to an account from the defendant.

It is a question of fact to be determined by the evidence. I cannot say that the demeanour of the two parties in the witness box would warrant me in stating that one was more truthful or credible than the other.

I have, therefore, to look to the surrounding circumstances to arrive at a conclusion. I do not overlook the fact that the consideration in the quit claim deed being the nominal sum of $1, the onus is on the defendant to establish the payment of the $65 to the plaintiff. The defendant swears that he paid the money to the plaintiff in his (the plaintiff's) private office; that, on coming out, he asked the plaintiff for a receipt in the presence of Isbister, a law student in the plaintiff's office, and that the plaintiff said, "You have the title deed—you do not want anything more"—or words to that effect.

Isbister states that, when they came out in the front office where he was, the defendant said, "Had not you better

give me a receipt," and that the plaintiff replied, "You have got the title," or, "the title is in you and you don't require anything more," and that the defendant then asked him, Isbister, if that was all right, and he answered that it was.

The defendant states further as to the $65, that he had $30 with him and that he borrowed $35 from A. L. Clement. On being asked about this, Clement said that he had heard the plaintiff and the defendant talk about settling up; that the defendant then said he had not enough money to pay the plaintiff in cash, and that he, Clement, lent him $35. Those statements of Isbister and Clement corroborate, indirectly at least, the defendant's statement as to that payment.

There are the further circumstances shewn in the evidence that, after the application for the loan, the application for insurance, and the giving of the quit claim deed, plaintiff seemed to have taken no more interest in the property. He admits that he did not ask defendant for an account of the surplus of the loan over the amount paid to Burrows; he did not inquire about the crop of 1904, or if the farm was rented for that season, or about the improvements made by the defendant on the land. Taking into consideration all the above circumstances, with the fact that the plaintiff made a conveyance of his interest in the land to the defendant, I am driven to the conclusion that the plaintiff has not made out such a case as would entitle him to the relief asked for, and I think the action should be dismissed with costs.

MANITOBA.

DUBUC, C.J. JANUARY 12TH, 1906.

TRIAL.

UNION BANK OF CANADA v. BLACKWOOD.

Sale of Goods—Ownership—Conversion—Seizure—Delivery —Acceptance.

This action was brought to recover the value of 356 cords of wood, the property in which was claimed by plaintiffs, and which, they alleged, the defendant took and converted to his own use.

F. G. Taylor and G. Barrett, for plaintiffs.

E. Anderson and J. D. Hunt, for defendant.

DUBUC, C.J.:—The wood was cut by one Robert Livingston on lands which he claimed to hold under an agreement for sale from the defendant. The land is described as the west half of section 9, township 13, range 13 west. The price was $3,200, payable in cash, in cattle, and in delivering 350 cords of wood. Under his agreement with the defendant, Livingston was to deliver the wood at the place designated by the defendant on section 2 of the same township. Livingston said that he paid nothing on the purchase price of the land, except $480 worth of cattle. He admits, also, that instead of hauling the wood and placing it on section 2, as he was bound by his agreement, he had piled it on section 10

The evidence of the defendant and of his two sons, Claude and Duff Blackwood, shews that when Livingston and the defendant met in February, or at the beginning of March, 1904, a large quantity of wood had already been hauled and piled; and the question of the place where the wood ought to have been put was discussed. Livingston admitted that the wood had not been delivered at the place fixed by the agreement; the defendant objected because the place where it was put was at a greater distance from the railway where it was to be shipped, and it would cost him more to draw it to the station. Livingston gave as his excuse that his sons, who had handled the wood, had not his copy of the agreement and that they did not know where it was to be delivered. He said he would make it all right for the extra costs of hauling. It was then agreed between them that the wood already delivered on section 2 would be accepted there by the defendant; that the future delivery would be at that place; and that the defendant would accept it there. On the same occasion, in February or March, Livingston asked the defendant's permission to ship a carload of the wood to his brother-in-law. Livingston admits asking for that permission, and said he shipped a car load containing about 14 cords. Towards the end of March the defendant and his son Claude went to the wood pile and measured the wood; they found 320 cords; they marked the different wood piles on both ends and in the middle with the letters S. C. V. painted in red, these letters being the initials of the defendant's wife, who was the owner of the land on which the wood was piled.

On 16th April following, Livingston, who was indebted to the plaintiffs, made and executed the chattel mortgage on which they claim the wood. It is for 500 cords of wood,

stated to be on section 10. The amount of $1,000 secured by the chattel mortgage was made payable on 1st October. On 8th October, Livingston having paid nothing on the chattel mortgage, the plaintiffs sent their bailiff, who seized the wood under the chattel mortgage. The defendant had already removed and shipped part of the wood. On the wood being seized, the men employed to haul it stopped for a few days, and then continued to haul it to the station and to ship it. The defendant knew at the time he commenced to move the wood that the plaintiffs had a chattel mortgage on it, and he was also aware of the seizure.

The dispute is, of course, as to the ownership of the wood. If, on 16th April, it belonged to Livingston, the chattel mortgage was good, and the plaintiffs are entitled to recover.

The question is, whether on that date the wood had been delivered by Livingston and accepted by the defendant so as to pass the property in it. Delivery and acceptance required to pass the property in goods is, in many instances, a question of intention. In Young v. Matthews, L. R. 2 C. P. 127, it was held that it depends on the intention of the parties whether the property in goods, to which something remains to be done before they are ready to be delivered, passes at the time of the sale, or on the completion of the goods. Coleridge, C.J., said in Ogg v. Shuter, L. R. 10 C. P. at p. 162: "The rule as deducible from all the cases and as it is laid down in the learned works of Mr. Justice Blackburn and Mr. Benjamin on Sale is, that the question whether the property has passed being one of intention to be collected from all the circumstances, no single circumstance is necessarily conclusive in all cases, but the conclusion to be drawn must depend on a balance of the various circumstances on one side and the other." Markman v. Kitching, L. R. 7 Q. B. 436, is to the same effect. In the present case the evidence shews that, when Livingston and the defendant met towards the end of February or beginning of March, both parties intended that the property in the wood should pass to the defendant. When Livingston tried to excuse himself for not having put the wood at the place fixed by the agreement, and when he asked permission from the defendant to take a carload of it to ship to his relative, he not only shewed an intention that

the wood should be the property of the defendant, but he formally recognized that it was the defendant's property. That was certainly an appropriation of the wood to the defendant, if it had not been appropriated to him.

When subsequently, towards the end of March, the defendant and his son went and measured the wood and had their mark put upon it, it certainly operated as a change of possession, if such change of possession had not already taken place. It being so, it follows that Livingston had no property in the wood when, on 16th April, he made the chattel mortgage in favour of plaintiffs, and the plaintiffs therefore took nothing by it. It follows, also, that the seizure made on 8th October was invalid and of no effect, and the defendant was entitled to disregard it.

In another point of view, the defendant may be said to have had more right to that wood than an ordinary purchaser, because the wood had been cut on lands of which, so far as the evidence goes, he had full and undisputed control. He had purchased the land for his brother, who had left it in his hands, apparently to do as he pleased with.

The plaintiffs' counsel raised the question of ownership of the land and of the right of the defendant to dispose of the wood. But, as regards the plaintiffs, it does not seem to me that it makes any difference. In a dealing like the one in question between the defendant and Livingston, I do not see that either the plaintiffs or Livingston can avail themselves of the rights of third parties in order to make for themselves, or either of them, a title to the wood.

This case differs from that of Bernhart v. McCutcheon, 12 Man. L. R. 394, where the chattel mortgage had been made and registered before the defendant went to the wood, formally accepted it, and shipped it.

In my opinion, plaintiffs have failed to establish their title to the wood in question, and the action should be dismissed with costs.

MANITOBA.

DUBUC, C.J. JANUARY 12TH, 1906.

TRIAL.

MEIGHEN v. ARMSTRONG.

Landlord and Tenant—Distress for Rent—Illegal Distress—Seizure of Growing Crops—Chattel Mortgage.

Plaintiff advanced to defendants Jeanette A. Todd and Thomas E. Todd the sum of $310 to assist them in purchasing seed grain, and took as security a seed grain chattel mortgage on the crop to be grown on certain lands leased by Jeannette A. Todd from the defendant Armstrong, and other lands described in the mortgage.

The mortgage was dated 19th April, 1904. The lease bore date 1st April, 1904.

The rent reserved by the lease was one-third of the grain and one-third of the hay to be grown on the lands. The lease provided that the lessee was to thresh the grain crop and to draw it to the elevator or cars, to be stored and shipped as might be agreed between the lessor and the lessee, in the name of the lessor.

The grain was threshed in the fall; the wheat was put in a bin in the granary; the oats and barley were divided between Todd and one McDonald, who was sent there by Armstrong; McDonald said that he was authorized by Armstrong to make the division, but Armstrong stated that he did not give him such authority.

On 19th November Armstrong went with his bailiff Bullard to the place where the grain was stored, and, under a warrant of distress, signed by him as landlord, the grain, as well as the hay, was seized for rent. There was no evidence that notice of seizure, or of appraisement, or of sale, was given to Mrs. Todd, or to her husband: the grain and hay were sold and the proceeds appropriated by Armstrong.

On 1st December, nothing having been paid on the chattel mortgage, the plaintiff had a seizure made, under his chattel mortgage, of what remained of the grain, and the sale thereof realized about $80.

The plaintiff brought his action against Armstrong and the two Todds for the balance due under his mortgage; he charged Armstrong with conversion of the grain, and, in the alternative, he claimed for money had and received.

T. M. Daly, K.C., and A. Meighen, for plaintiff.

J. A. M. Aikins, K.C., and F. G. Taylor, for defendants.

DUBUC, C.J.:—Several points were raised by the plaintiff against the validity of the distress for rent and sale of the grain by Armstrong, and by the defendant Armstrong against the validity of the chattel mortgage.

The seizure of the grain by Armstrong under the lease was made when there was no rent due and in arrear; as there was no time fixed by the lease for the delivery of the grain by Todd, he had until the end of his term, viz., until the 31st March, 1905, to make delivery.

There being no rent due at the time of seizure, the distress was illegal: Bell on Landlord and Tenant, 267; per Taylor, C.J., in Mowat v. Clement, 3 Man. L. R. 595.

Armstrong contends that Todd had broken the lease by not transporting the grain to the elevator or cars, and that, on account of that breach, he was entitled to distrain. But as to that part also of the tenant's obligation under the lease, there was no time fixed, and Todd had until March 31st to do it. So the distress cannot be justified on that ground. Armstrong states that he saw no one in possession of the premises when he went to make the seizure, and Todd says he did not hear of the seizure until eight or ten days after it was made, and all the grain had then been removed. Bell on Landlord and Tenant, p. 271, says that the tenant must be in possession of the premises, otherwise a distress is unlawful; and he cites several cases in support of that proposition. For the above reasons I think it should be held that Armstrong had no right to distrain at the time he made the seizure, and that such seizure was illegal and void.

One of the points raised by Armstrong against the validity of the plaintiff's chattel mortgage is that the affidavit of bona

fides is in language different from that prescribed by the Bills of Sale and Chattel Mortgage Act, R. S. M. ch. 11. Section 12 of that Act says that if the affidavit is made by an agent, he shall state that "he is aware of all the circumstances connected with the sale or mortgage, as the case may be." In the chattel mortgage in question Arthur Meighen states that he is the authorized agent of the mortgagee, and that "he has a knowledge of all the facts connected with the said mortgage."

I think that what he states means about the same thing as what is required by the Act, and that, under Emerson v. Bannerman, 19 S. C. R. 1, Rogers v. Carroll, 30 O. R. 328, Mathers v. Lynch, 28 U. C. R. 354, it should be held that the variation is not such as to vitiate the chattel mortgage.

Armstrong raises also the objection that the grain was sold to Todd by Carruth and not by the plaintiff, and that the money was advanced by the plaintiff to Todd as a loan. The whole transaction was carried out on the part of the plaintiff by his agent and solicitor, Arthur Meighen.

Carruth did not sell the grain to Todd; he only delivered it to him after being assured by the plaintiff's agent that the price for the same would be paid by the agent. By an understanding between the three parties it was agreed that the money was to be paid by the plaintiff for the grain to be delivered by Carruth to Todd, and that Todd was to secure the advance by giving the chattel mortgage, and, in compliance with that arrangement, Todd executed the mortgage in question.

It seems to me that there is nothing there violating, either in spirit or letter, the provisions of the Bills of Sale and Chattel Mortgage Act, and that under Kirchhoffer v. Clement, 11 Man. L. R. 460, the chattel mortgage should not be held invalid on that ground.

Another point urged against the mortgage is, that the price of the seed grain purchased by Todd amounted only to $300.75, and that the mortgage was taken for $310.

Mr. Meighen explained that, according to a practice prevailing among the members of the profession in his district, the sum of $10 is generally added for costs of conveyance and registration.

Section 39 of the Act says that any mortgage or bill of sale shall, so far as the same assumes to bind, comprise, apply to, or affect any growing crop, in whole or in part, be absolutely void, except the same be made as a security for the purchase price and interest thereon, of seed grain. Here, the consideration stated in the mortgage is for more than the purchase price of the seed grain. So far as the growing crop is concerned, there is a portion of the consideration which is illegal, as directly against the provision of the statute. In his work on Statutes, Maxwell says, at p. 661: "If a deed was made on a consideration, part of which was illegal, the whole instrument would be void, for every part of it would be affected by the illegal consideration." In Ex p. Charing Cross Advance and Deposit Bank, 16 Ch. D. 35, the expressed consideration was £120, while only £90 was actually advanced, the other £30 being retained for interest and expenses; the bill of sale was held void as not stating the true consideration. The same was held in Ex p. Bostenson, 42 L. T. 808, and In re Rolfe, 19 Ch. D. 98. In Hamilton v. Chaine, 7 Q. B. D. 319, the consideration expressed in the bill of sale was £700; of this £7 10s. was retained by the grantee for commission. It was held that the consideration was not truly stated, and that the bill of sale was void.

On that ground and under the above authorities I think that the plaintiff's chattel mortgage must be held void as against Armstrong.

The conduct of Armstrong in seizing and selling the grain under an illegal distress when there was no rent due, was no doubt wrong and unjustifiable, and Jeannette A. Todd may have her recourse against him for so doing, but the plaintiff's claim against Armstrong is only under his chattel mortgage, and, it being illegal and void, he cannot recover against him. The chattel mortgage is, however, valid against the Todds as an instrument under their hands and seals, by which they agreed to pay him the amount advanced for the seed grain.

In my opinion, there should be judgment for the plaintiff against Jeannette A. Todd and Thomas E. Todd for the amount due under the chattel mortgage, with costs of the action, which should be enforced as against Armstrong, with no costs.

Judgment accordingly.

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